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Supreme Court, U.S.
FILED
JAN 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

TERRANCE L. GUIDER,
Petitioner,

v.

RONALD SMITH AND THE CITY OF DETROIT,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

Brian G. Shannon*
JAFFE, SNIDER, RAITT & HEUER,
Professional Corporation
1800 First National Building
Detroit, Michigan 48226
(313) 961-8380

Theodore Spearman
THEODORE SPEARMAN, P.C.
975 East Jefferson Avenue
Detroit, Michigan 48207

Attorneys for Petitioner Terrance L. Guider

*Counsel of Record

BOWNE OF DETROIT
615 SECOND AVENUE - DETROIT, MICHIGAN 48226 - (313) 964-1330

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QUESTIONS PRESENTED

I. Whether an egregiously wronged and severely injured plaintiff's "bright prospects" of recovering substantial damages at the time counsel is retained to institute an action under 42 U.S.C. § 1983 is a "special circumstance" rendering an award of attorney's fees under 42 U.S.C. § 1988 "unjust."

II. Whether, assuming the "bright prospects rule" is a permissible and desirable gloss on 42 U.S.C. § 1988, it is an abuse of discretion to deny attorney's fees on the basis of that rule in circumstances of the kind found in this case at the time counsel was retained.

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No.

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TERRANCE L. GUIDER,
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RONALD SMITH and the CITY OF DETROIT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

Terrance L. Guider petitions for a writ of certiorari to review a final decision of the Michigan state courts denying attorney's fees under 42 U.S.C. § 1988 on the basis of a doctrine commonly called the "bright prospects" rule, a creation of the Second Circuit (widely repudiated by other federal circuits) pursuant to which an egregiously wronged and severely injured plaintiff's "bright prospects" of recovering substantial damages at the time counsel is retained to institute an action under 42 U.S.C. § 1983 is deemed to be a "special circumstance" rendering an award of attorney's fees under Section 1988 unjust.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals (App. A, *infra*, 6a-28a) is reported at 157 Mich. App. 92, 403 N.W.2d 505 (1987). Guider's delayed application for leave to appeal to the Supreme Court of Michigan was denied on October 6, 1987 (App. A, *infra*, 29a-30a); this order is reported at 429 Mich. 857-858, 412 N.W.2d 924 (1987). The decision of the Court of Appeals affirmed an order of the Circuit Court for the County of Wayne (App. A, *infra*, 5a) entered pursuant to an oral opinion delivered from the bench (App. A, *infra*, 1a-4a); neither the opinion nor the order of the Circuit Court were reported.

JURISDICTION

Jurisdiction to review the judgment in question by writ of certiorari is provided by 28 U.S.C. § 1257(3). This petition is being filed within 90 days of the Supreme Court of Michigan's order of October 6, 1987.

STATUTE INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976 amended 42 U.S.C. § 1988 to provide that in any action to enforce, *inter alia*, 42 U.S.C. § 1983 (the Civil Rights Act of 1871),

> the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988. The text of Section 1988 appears at App. B, *infra*, 31a.

STATEMENT OF THE CASE

On April 20, 1978, Respondent Ronald Smith, a police officer employed by Respondent City of Detroit, shot Petitioner Terrance L. Guider. The factual circumstances, described in the Court of Appeals opinion (App A, *infra,* at 10a-11a), were similar to those described in *Tennessee* v. *Garner,* 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), *aff'g Garner* v. *Memphis Police Department,* 710 F.2d 240 (6th Cir. 1983). Guider sued Smith and the City in the Circuit Court for the County of Wayne (9a), where the question whether defendants had violated Guider's civil rights, 42 U.S.C. § 1983, was tried to a jury in 1983. The trial court granted the City a directed verdict; the jury returned a verdict against Smith and assessed compensatory damages at $472,000 (9a-10a).

Smith's decision to fire was regulated by a Detroit Police Department rule. The rule put a gloss on Michigan's common law[1] by listing and limiting the felonies with respect to which deadly force was permissible, unconstitutionally including the crime of breaking and entering (22a; 24a-25a). The trial court erroneously believed that the Detroit regulation was constitutional, despite Guider's argument that the Sixth Circuit's then just-released analysis in *Garner* was controlling. (This Court affirmed *Garner* while Guider's case was pending in the Michigan Court of Appeals.) With the City out of the case and its deadly force rule held to be constitutional, Guider contended that the facts showed Smith could not reasonably have believed deadly force was necessary to prevent escape (20a).

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[1]Michigan common law permitted the use of deadly force if reasonably necessary to apprehend *any* suspected felon. *Werner* v. *Hartfelder,* 113 Mich. App. 747, 318 N.W.2d 825 (1982), *lv den* 418 Mich. 520 (1984). This law was the exact equivalent of the Tennessee statute held unconstitutional in *Garner.* The trial court did not expressly rule on the constitutionality of the common law because it held Smith was entitled to rely on the Detroit regulation described in the text, which was the standard Smith purportedly applied. Smith failed to meet that standard. *See Jenkins* v. *Averett,* 424 F.2d 1228 (4th Cir. 1970).

Smith appealed the judgment against him and Guider cross-appealed from the directed verdict granted the City. Smith lost his appeal on all issues presented to the Michigan Court of Appeals (11a-23a) and the City lost the cross-appeal on the ground that its deadly force rule violated the Fourth Amendment of the Constitution (24a-25a). Smith and the City applied to the Supreme Court of Michigan for leave to appeal and that Court agreed to hear a single issue, namely whether the judgment against Smith should be reversed based on the doctrine of qualified immunity (30a). The Supreme Court declined to review the decision that the City was directly liable to Guider on *Garner* grounds for the unconstitutional police department rule.[2]

After trial Guider moved for an award of attorney's fees pursuant to Section 1988. The trial court denied the motion (5a) based on the so-called "bright prospects" rule announced in *Zarcone* v. *Perry*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 434 U.S. 1072, 99 S. Ct. 843, 59 L. Ed. 2d 38 (1979), and discussed at length *infra* (1a-4a). The Michigan Court of Appeals affirmed, acknowledging that "the bright prospects rule has not been universally accepted by the federal courts," but deciding to apply it on the strength of three decisions from the Second Circuit (25a-27a). Guider filed a delayed application[3] to the Supreme Court of Michigan on the attorney's fee issue. The application was denied on the merits on October 6, 1987 (30a). This petition followed.

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[2]Accordingly, Guider will remain the prevailing party regardless of the Michigan Supreme Court's disposition of the qualified immunity issue in Smith's case.

[3]Guider's application for leave to appeal was "delayed" (*i.e.*, filed more than 21 days but not more than 56 days after rehearing was denied in the Michigan Court of Appeals, *see* M.C.R. 7.302(C)(3)) because his appellate counsel erroneously assumed he would be filing a cross-application with a later due date in response to Respondents' application. In fact, because the attorney's fee issue arose in a procedurally consolidated but separately docketed appeal, his application was due at the same time as Respondents' application. In any event, the Supreme Court of Michigan denied leave to appeal on the merits (30a).

REASONS FOR GRANTING THE WRIT

I.

AN EGREGIOUSLY WRONGED AND SEVERELY INJURED PLAINTIFF'S "BRIGHT PROSPECTS" OF RECOVERING SUBSTANTIAL DAMAGES AT THE TIME COUNSEL IS RETAINED TO INSTITUTE AN ACTION UNDER SECTION 1983 IS NOT A "SPECIAL CIRCUMSTANCE" RENDERING AN AWARD OF ATTORNEY'S FEES UNDER SECTION 1988 "UNJUST."

This case squarely presents the question whether the Second Circuit's "bright prospects" doctrine, which is now repudiated in every other federal circuit to have considered the issue, is a permissible and desirable gloss on Section 1988. The question is important because, as this case demonstrates, the "bright prospects" rule is not going to sink out of sight by itself. It is still the rule in the Second Circuit. It is also an acceptable rule for federal civil rights cases brought in the Michigan state courts, now that the Supreme Court of Michigan has declined to review the Court of Appeals conclusion that the bright prospects doctrine "is supported by a substantial body of case law" (26a). Unless this Court intervenes, prevailing plaintiffs in civil rights cases will continue to be denied attorney's fees precisely because their rights were violated egregiously and the resulting injuries were severe.

A. THE GENERAL RULE: A PREVAILING PLAINTIFF RECOVERS ATTORNEY'S FEES UNLESS SPECIAL CIRCUMSTANCES RENDER SUCH AN AWARD UNJUST.

Section 1988 permits a trial court "in its discretion" to "allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Guider is indisputably the prevailing party. He prevailed against Smith at trial and

against the City in the Michigan Court of Appeals.[4] Although Section 1988 speaks in terms of "discretion," the cases have severely limited that discretion. The general rule, now sometimes called the Newman-Northcross rule, is usually stated as follows: A prevailing party should ordinarily recover attorney fees unless special circumstances would render such an award unjust. *See Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968); *Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 624, 632-633 (6th Cir. 1979), *cert. denied* 447 U.S. 911, 100 S. Ct. 299, 64 L. Ed. 2d 862 (1980). *See* S. Rep. No. 94-1011, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5912. This Court reaffirmed the general rule in *Hensley* v. *Eckerhart*, 461 U.S. 424, 429, 103 S. Ct. 1933, 1937, 76 L. Ed. 2d 40, 48 (1983).

All three cases cited by the Michigan Court of Appeals as authority for denying fees to Guider acknowledge the general rule: *Milwe* v. *Cavuoto*, 653 F.2d 80, 82 (2d Cir. 1981); *Kerr* v. *Quinn*, 692 F.2d 875, 877 (2d Cir. 1982) (both citing *Newman*) and *DiFilippo* v. *Morizio*, 759 F.2d 231, 234 (2d Cir. 1985) (citing *Hensley*). *Zarcone, supra*, the Second Circuit case that originated the "bright prospects" rule, acknowledges the general rule at length. 581 F.2d at 1042-1043. Circuits other than the Second also unanimously acknowledge the rule. *See, e.g., Jones* v. *Wilkinson*, 800 F.2d 989, 991 (10th Cir. 1986); *Martin* v. *Heckler*, 773 F.2d 1145, 1149-1150 (11th Cir. 1985); *Hamner* v. *Rios*, 769 F.2d 1404, 1406-1407 (9th Cir. 1985); *Lenard* v. *Argento*, 699 F.2d 874, 899 (7th Cir.), *cert. denied* 464 U.S. 815, 104 S. Ct. 69, 78 L. Ed. 2d 84 (1983); *Hall* v. *Hall*, 738 F.2d 718, 720-721 (6th Cir. 1984). The general rule fosters the several purposes of Section 1988: To "secure effective representation for civil rights litigants," to penalize "obstructive litigation by a civil rights

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[4]The pendency of Smith's appeal in the Supreme Court of Michigan on the qualified immunity issue cannot affect Guider's status as the prevailing party. The City is independently liable on *Garner* grounds (24a-25a) and the Supreme Court of Michigan has declined to review that issue (30a).

defendant and generally [to deter] civil rights violations." *Cooper* v. *Singer,* 719 F.2d 1496, 1501 (10th Cir. 1983) (en banc).

B. THE SECOND CIRCUIT'S "BRIGHT PROSPECTS" EXCEPTION: THE READY AVAILABILITY OF COMPETENT COUNSEL ON A CONTINGENT FEE BASIS IN CASES WITH STRONG MERITS AND SUBSTANTIAL DAMAGES IS TREATED AS A SPECIAL CIRCUMSTANCE RENDERING AN AWARD UNJUST.

The "bright prospects" exception created by the Second Circuit in *Zarcone* and reiterated in *Milwe, Kerr* and *DeFilippo* is not now accepted anywhere outside the Second Circuit and the state courts of Michigan. It did enjoy a brief vogue in the Ninth Circuit, *Buxton* v. *Patel,* 595 F.2d 1182 (9th Cir. 1979), but *Buxton* has been rejected in the Ninth Circuit as inconsistent with *Hensley. Hamner, supra,* 769 F.2d at 1407.

Zarcone involved a Section 1983 claim brought by a coffee vendor against a judge and sheriff for various acts of outrageous misconduct inflicted on the vendor because the judge didn't like his coffee. Zarcone recovered $141,000 in damages, including $61,000 in punitive damages. The Second Circuit upheld the trial court's denial of fees based on its determination that the "clear wrongfulness" of the defendants' conduct made the plaintiff's prospects of recovery "bright" enough to attract competent counsel on a contingent fee basis. There was thus "no financial disincentive or bar to vigorous enforcement" of the plaintiff's civil rights. 581 F.2d at 1044.

In the case at bar the Michigan Court of Appeals stated the rule thus:

> The bright prospects rule requires the trial court to determine whether the substantive claim was so strong on the merits so as to likely result in a substantial judgment such that private counsel could be easily and readily obtainable. Thus, it must be determined whether, absent an award of

attorney fees, a similarly situated plaintiff would be deterred from enforcing his constitutional rights.

Guider v. *Smith*, 157 Mich. App. at 112, 403 N.W.2d at 515 (1987) (26a) (citation omitted).

C. THE "BRIGHT PROSPECTS" RULE HAS BEEN EXPRESSLY REPUDIATED BY THE SEVENTH, NINTH AND TENTH CIRCUITS AND IS INCONSISTENT WITH THE DECISIONS OF SEVERAL OTHER CIRCUITS, RECENT DECISIONS OF THIS COURT AND THE INTENT OF CONGRESS.

The reasons announced by other courts[5] for rejecting "bright prospects" are usually the same: The rule is too limited because it considers only whether the plaintiff can get into court and ignores the punitive and deterrent purposes served by Section 1988. Indeed, when those purposes are considered the rule is affirmatively harmful. The practical effect of the "bright prospects" rule is to penalize the plaintiff who has been severely damaged by a particularly outrageous violation of his or her constitutional rights. Such a plaintiff may have no trouble finding competent counsel, but may enjoy a smaller net recovery than a plaintiff with similar damages but a less obvious claim. This injustice aside, there are other reasons to reject the "bright prospects" rule than those usually articulated. Because it often is impossible to pigeonhole civil rights liability issues as "bright" or "not bright," attorneys in a "bright prospects" jurisdiction often will not be able to assess the value of a case when it is offered to them. In short, as Guider discusses in the next subsection, the rule does not even do a good job of serving the access-to-court rationale underlying Section 1988. Still, the reasons given in the Seventh, Ninth and Tenth Circuit cases for rejecting "bright prospects" are convincing enough.

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[5]Including other state courts: *Thompson* v. *Village of Hales Corners*, 340 N.W.2d 704, 715 (Wisc. 1983); *Duranceau* v. *City of Tacoma*, 684 P.2d 1311, 1316-1317 (Wash. App. 1984).

The Michigan Court of Appeals acknowledged only the Tenth Circuit rejection of "bright prospects" (26a). In *Cooper* v. *Singer,* 719 F.2d 1496 (10th Cir. 1983) (en banc), the Court of Appeals disagreed with the rationale that Section 1988 is intended *only* to secure effective representation for civil rights litigants. The Court rejected this narrow application of Section 1988 because it ignored the other fundamental purposes of an award of attorney's fees mentioned earlier: "[P]enalizing obstructive litigation by a civil rights defendant and generally deterring civil rights violations." *Id.* at 1501-1502. The Tenth Circuit recently reiterated its position in *Jones* v. *Wilkinson,* 800 F.2d 989, 991 (10th Cir. 1986), where it held even more explicitly than before that "the ability of a party to bring a suit without a fee award is not a special circumstance rendering a fee award unjust."

Similarly, the Seventh Circuit in *Sanchez* v. *Schwartz,* 688 F.2d 503 (7th Cir. 1982), rejected the approach of *Zarcone* because "there is no indication whatsoever that [the bright prospects standard] was in the mind of Congress when it enacted the Fees Awards Act." *Id.* at 505. The Seventh Circuit recapped *Sanchez* recently as follows:

> We rejected the "bright prospects" rule, concluding that although "bright prospects" might attract counsel, the functions of § 1988 include shifting the costs of counsel to those who occasioned the suit, not just ensuring that the plaintiffs could sue. An award of fees enables the plaintiff to keep the whole recovery and brings home to the defendants the full social costs of their unconstitutional conduct, costs that include litigation as well as the original damages.

Kirchoff v. *Flynn,* 786 F.2d 320, 327 (7th Cir. 1986).

In the Ninth Circuit, as noted earlier, *Hamner* v. *Rios,* 769 F.2d 1404, 1407-1408 (9th Cir. 1985), rejects "bright prospects" because of this Court's 1983 decision in *Hensley:*

> *Hensley* undermines language in *Buxton* v. *Patel* stating that courts should be more cautious in awarding fees where damages are sought and prospects of success are bright.

Hensley overrules *Buxton* v. *Patel* to the extent the latter is inconsistent with the ruling in *Hensley* that prevailing civil rights plaintiffs are ordinarily entitled to attorney's fees. The legislative history of section 1988 indicates that "the effects of such fee awards are ancillary and incident to securing compliance with [the Civil Rights] laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance." S. Rep. No. 94-1011, 94th Cong. 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5913.

The "bright prospects" rule is inconsistent with the decisions in several other circuits. In the First Circuit it was virtually rejected before it was created, because two months before *Zarcone* came the decision in *Sargeant* v. *Sharp,* 579 F.2d 645 (1st Cir. 1978), which recognized that "[a] private fee arrangement is not in itself 'special circumstances which would render an award unjust' . . ." *Id.* at 649. In the Third Circuit Guider finds no explicit mention of "bright prospects," but the doctrine cannot be reconciled with *Sullivan* v. *Crown Paper Bd. Co., Inc.,* 719 F.2d 667 (3d Cir. 1983). Sullivan recognizes that fee awards in contingent cases as well as others are "an integral part of the remedies necessary to obtain" compliance with the civil rights laws, and that the issue is not whether to award fees in contingent cases but how to calculate those fees. *Id.* at 669. In the Fifth Circuit the doctrine is inconsistent with *Gibbs* v. *Town of Frisco City,* 626 F.2d 1218; 1221 n.4 (5th Cir. 1980). In the Sixth Circuit it is inconsistent with *Hall* v. *Hall,* 738 F.2d 718, 720-721 (6th Cir. 1984).

Finally, because the "bright prospects" rule is premised on the assumption that suits like Guider's are second-class civil rights actions resulting in merely tort-like remedies,[6] the rule is flatly inconsistent with this Court's decision in *Riverside* v. *Rivera*, 477 U.S. ___, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986). As Justice Brennan said there:

> [W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.... And, Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff...."

91 L. Ed. 2d at 479 (citations omitted) (plurality opinion; disagreement among the justices concerned different issues. As *Hamner* points out, the rule also is inconsistent with this Court's decision in *Hensley*. 769 F.2d at 1407-1408.

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[6]In *Zarcone*, for example, the Court claims in a footnote *not* to be "influenced by the fact that plaintiff's underlying federal constitutional claim might also have served as the basis for a state tort action," 581 F.2d at 1045 n.6, but states in text that plaintiff "sued on his own behalf for damages to redress an essentially private injury," acting as "a private attorney general only in an attenuated sense." *Id.* at 1044. Similarly, in the case at bar the trial court recognized that civil rights were involved but emphasized in denying fees that "you are really talking about individual torts" (4a); the Michigan Court of Appeals spoke in terms of Guider's "quasi-tort constitutional claim" (26a). Even if the distinction has any validity at all, which seems doubtful in light of comments like those of Justice Brennan quoted above, *Zarcone* did at least involve the singular circumstance of a rogue judge run amok while Guider's case, in which the Detroit police department's regulation on the use of deadly force has been held to violate the Forth Amendment, is by comparison a classic instance of the private attorney general concept at work. *See* section II, *infra*.

D. THE APPROVAL OF THE "BRIGHT PROSPECTS" RULE AS SOUND DOCTRINE BY THE MICHIGAN COURTS FURNISHES THIS COURT WITH A SUITABLE CASE IN WHICH TO DECLARE THAT THE RULE DOES NOT SERVE ANY OF THE PURPOSES UNDERLYING SECTION 1988, CANNOT BE APPLIED IN AN ANALYTICALLY RATIONAL OR PREDICTABLE MANNER, PUNISHES A CLASS OF PLAINTIFFS WHOSE ENTITLEMENT TO FEE-SHIFTING IS PARTICULARLY APPARENT, AND HENCEFORTH SHALL NOT BE APPLIED BY ANY FEDERAL OR STATE JUDGE CONSIDERING WHETHER TO AWARD FEES UNDER SECTION 1988.

This Court should resolve the split in the federal circuits on this important issue by stating unequivocally that the majority view is correct and that the views expressed by the Second Circuit and the Michigan Court of Appeals are erroneous. The issue could not be presented more clearly than it is here. The "bright prospects" rule is the entire basis of decision in this case.

Guider is unable to locate *any* recent cases interpreting Section 1988 which even remotely suggest that similarity to tort actions, substantial damages or a contingent fee agreement can be "special circumstances" rendering the award of fees unjust. The absence of such cases is very telling, because it is precisely those elements which invariably exist whenever the "bright prospects" rule is invoked. Despite the disclaimers to be found in *Zarcone* and *Milwe* (*see* footnote 6, *supra,* and text *infra*), the "bright prospects" rule is inextricably bound to the notion that a civil rights case which is similar to a private tort action is inherently less deserving of a Section 1988 award than a civil rights action directly involving a class of plaintiffs and injunctive relief. That notion, however, is incorrect and *Riverside* is by no means the first case to point out the error.

Milwe, supra, one of the Second Circuit cases relied upon by the Michigan Court of Appeals, pointed out that "an individual

damage action to redress instances of police misconduct is often the only tool reasonably available to vindicate society's interest in ensuring that those who enforce the law also abide by it." 653 F.2d at 84. *Accord, Fox* v. *Parker,* 626 F.2d 351, 353 (4th Cir. 1980); *Gibbs* v. *Town of Frisco City, Alabama Police Department,* 626 F.2d 1218, 1221 (5th Cir. 1980); *Wheatley* v. *Ford,* 679 F.2d 1037, 1040 (2d Cir. 1982).

The fact that substantial damages are awarded is entirely irrelevant in determining whether to grant a fee award. *Lenard* v. *Argento,* 699 F.2d 874, 899 (7th Cir.), *cert. denied* 104 S. Ct. 69, 78 L. Ed. 2d 84 (1983) ("[t]he amount of the damage award, large or small, is not a circumstance to be considered in the awarding of fees"); *see also Sethy* v. *Alameda County Water Dist.,* 602 F.2d 894 (9th Cir. 1979). The fact that the prevailing plaintiff has a contingent fee agreement is likewise irrelevant to the question of entitlement to fees. *See, e.g., Cooper, supra,* 719 F.2d at 1501, 1502 (en banc opinion applying this Court's decision in *Hensley* to the "bright prospects" rule); *Sargeant, supra,* 579 F.2d at 649.

This abundance of authority aside, if a system of fee-shifting in civil rights cases were being designed from scratch, the "bright prospects" rule would be a terrible public policy choice. More is involved than merely overlooking two out of the three basic policies justifying fee awards to prevailing plaintiffs. The "bright prospects" exception is actually counterproductive to the accomplishment of those two unserved policies (penalizing the obdurate violator in court and deterring others from becoming violators). Fee-shifting "brings home . . . the full social costs of . . . unconstitutional conduct," *Kirchoff, supra,* 786 F.2d at 327, and is "an integral part of the remedies necessary to obtain . . . compliance" with the civil rights laws, *Hamner, supra,* 769 F.2d at 1408.

The "bright prospects" rule also discriminates against poor and moderate-income citizens. It is they who most often must depend on contingent fee agreements when their rights are violated and who are least able to afford paying their attorneys a significant percentage of their damages. Yet it is they who are

most likely to be denied fees pursuant to the "bright prospects" exception. Guider believes that every case in which fees were denied because of the "bright prospects" rule has involved a contingent fee contract. A plaintiff who is financially able to retain private counsel need have no fear that an award of fees will be denied on the ground that it is unnecessary. All cases agree on this, including those from the Second Circuit. In *Milwe, supra,* 653 F.2d at 83, the Court was clear:

> Congress did not intend that the vindication of statutorily granted rights would depend on the private party's economic resources or on the availability of free legal assistance. . . . That plaintiff was fortunate enough to be financially able to retain private counsel is irrelevant.

"Bright prospects" is nothing but another way of saying that a poor or moderate-income plaintiff has an "asset" — the value of his or her injuries in the eyes of contingent fee counsel — that makes a fee award unnecessary. But what principled distinction is there between this "asset" and the wealthy plaintiff's bank account? Clearly, none. If the bank account is irrelevant — and it is — then so too must be bright prospects of a substantial recovery.

Finally, "bright prospects" just adds an unnecessary additional layer of factual inquiry in an area already overburdened with thorny questions of what constitutes a reasonable fee, a prevailing plaintiff, etc. The Second Circuit has been refining "bright prospects" for 10 years and still questions remain. In the case at bar, Respondents thus far have focused exclusively on the severity of Guider's injuries, apparently on the assumption that the catastrophically injured plaintiff can always attract contingent fee counsel, no matter how difficult the liability issues might be. The Second Circuit cases seem to take a more balanced view, but the fact remains that even a seasoned attorney in a "bright prospects" jurisdiction cannot assess the true value of a whole class of civil rights cases unless that value is extremely high (as to both damages and liability) or extremely low. It is fair to assume that some attorneys in that situation inevitably will choose not to accept some cases in the middle range solely because of the

"bright prospects" rule. Although the rule is not intended to have any impact on the ability of would-be civil rights plaintiffs to attract competent counsel, it necessarily has a negative impact. Viewed in any light, it is simply an unsound rule.

II.

EVEN ASSUMING THE "BRIGHT PROSPECTS" EXCEPTION IS A PERMISSIBLE AND DESIRABLE GLOSS ON 42 U.S.C. § 1988, IT IS AN ABUSE OF DISCRETION TO DENY ATTORNEY'S FEES ON THE BASIS OF THAT RULE IN CIRCUMSTANCES OF THE KIND FOUND IN THIS CASE AT THE TIME COUNSEL WAS RETAINED. AT A MINIMUM, A PLAINTIFF'S PROSPECTS MUST TRULY BE "BRIGHT" FOR THE EXCEPTION TO APPLY.

It is clear that the trial judge relied primarily upon the "bright prospects" rule in exercising his discretion to deny Guider attorney fees:

> I don't have any statistics, but [the City has] had some very large judgments against their police department and police officers. . . . So as far as suing the Police Department, I don't know if statistically you could say that your success is just very minimal when it comes to suits against police officers in the city of Detroit.
>
> . . . .
>
> So you are really looking, as I say, *Zarcone* vis-a-vis *Milwe*, and from what I see of *Milwe*, the big factor is — one of the big factors is likeliness of success.

(2a-3a). After weighing this and other factors, the trial judge concluded:

> I think the whole factor would be the brightness of success and here with all of the circumstances that the opportunity for success was not that dim that the attorney would not take

the case of Mr. Guider and bring an action against the City to enforce Mr. Guider's constitutional rights.

(4a). The denial of attorney fees in this case was a patent abuse of discretion. Assuming the "bright prospects" rule has any validity whatever, the trial judge misapplied it by speculating that Guider's action was one with "bright prospects" for success when to all appearances in 1980 the prospects were dim.

Undoubtedly a crime was committed by Neeley and Guider at 1125 Hague (10a). Neeley pleaded guilty to larceny from a building and was put on probation. Guider could not readily prove that he was not as guilty as Neeley. Indeed, Neeley had given the police a statement on the night of the shooting which blamed Guider for the whole incident. Not until the trial did Neeley admit he had lied to save himself that night after the police told him Guider was dead and he might be charged with murder.

A recorder's court judge found probable cause to bind Guider over on charges of breaking and entering an occupied dwelling, and he avoided prosecution only by qualifying for a diversion program for youthful offenders. Although Guider did not have a criminal record, he was a young man who had dropped out of high school and been unable to secure permanent employment. As a witness, only an incurable optimist would have initially considered him as credible as Officer Smith. Homicide's investigation of Smith lasted less than 12 hours, and his superiors saw no reason to even reprimand him. Although the trial court seemed to presume that the police were inherently at a disadvantage (2a-3a), "[a] plaintiff suing the police may encounter juries sympathetic to the defendants." *Kirchoff, supra,* 786 F.2d at 324.

No doubt factors such as these influenced a mediation panel to value Guider's case at only $30,000, not much more than his actual medical expenses (1a; 3a). The severity and permanent aftereffects of his injuries certainly would have commanded a substantial six-figure mediation award but for the mediators' belief that Guider had a long, uphill fight to establish liability. Significantly, the City and Smith *rejected* the mediation award. In

their minds Guider's action was not even worth $30,000. This should be kept in mind while reading their response to this petition, which will claim that Guider's prospects were bright at the outset.

Moreover, Guider *lost* at trial against the City and had to prosecute his cross-appeal in the Michigan Court of Appeals to prevail, finally, some seven years after suit was filed. Even then the City remained unconvinced of its liability and sought further review.

As emphasized by the Second Circuit in *Kerr, supra,* the trial court must consider a plaintiff's *prospective* chances of success, not the actual trial result. In *Kerr* the Second Circuit stressed that the trial judge in the underlying criminal case was satisfied that the arrest had probable cause. The same was true in Guider's case. It seems clear that the *Kerr* panel would find Guider was entitled to reasonable attorney fees. Kerr undoubtedly had brighter prospects of establishing liability than did Guider. The proper presentation of Guider's case involved a large initial investment of attorney time and money — particularly for police and medical expert witnesses (4a). The criminal case had to be handled as well. Guider was unable to pay for legal services and his case was distinctly unattractive to prospective counsel.

The facts aside, Guider's case arose long before the Fourth Amendment principle in *Garner, supra,* was established. When Guider retained counsel the law was considerably less clear and most attorneys would have had reservations about attacking the long-established common law of deadly force and fleeing felons. One need only read the dissenting opinion in *Garner* to find abundant authority from 1980 and before that cast doubt on Guider's claim against the City. As late as 1982 the Michigan Court of Appeals upheld the use of deadly force to seize unarmed, nonviolent fleeing felons. *Werner* v. *Hartfelder,* 113 Mich. App. 747, 318 N.W.2d 825 (1982), *lv. den.* 418 Mich. 520 (1984). To deprive Guider of fees because the law is solidly behind him now is to use hindsight, which is impermissible according to *Kerr. Kerr*

also cautions against penalizing a plaintiff because he found a "perspicacious, optimistic or risk-taking lawyer." 692 F.2d at 878.

The trial court's finding that Guider's action had "bright prospects" for success was a clear abuse of discretion and the Michigan Court of Appeals erred in failing to recognize it as such. The Supreme Court of Michigan's failure to review this case leaves Guider with no recourse but this Court. He is a prevailing plaintiff who has been denied an award of attorney's fees even though there are no "special circumstances" whatever that would render such an award unjust within the meaning of the general *Newman-Northcross* rule.

CONCLUSION

The "bright prospects" rule created in *Zarcone* is not, as the Michigan Court of Appeals claims, "supported by a substantial body of case law" (26a). Far from it. It is supported only by a line of cases in the Second Circuit that are completely out of step with the other federal circuits and state courts to have considered the issue.

The decision in this case has implications far beyond the injustice to Guider (although that is grave enough). The City of Detroit claims (and Guider does not dispute) that the number of federal civil rights claims brought in Michigan state courts is "steadily increasing." This means that the number of motions for fee awards pursuant to Section 1988 must also be steadily increasing. As matters stand now, the only guidance Michigan trial judges will find in Michigan appellate case law is *Guider* v. *Smith*, which in a few paragraphs resurrects almost every error from the early days of the Civil Rights Attorney's Fees Awards Act of 1976 (25a-27a). This opinion is dangerously wrong and must not be allowed to go unreversed.

There is no need to delay decision on this issue until the Supreme Court of Michigan has completed its review of Smith's qualified immunity issue. The "bright prospects" rule should be repudiated as bad law whether or not Guider is entitled to recover

against Smith and the City, and Guider will in no event be entitled to a fee award before he has a final order on the merits against the City or against the City and Smith.

For all the reasons discussed herein, Petitioner Terrance L. Guider requests that this Court grant the petition for a writ of certiorari to review the propriety of the "bright prospects" rule.

Respectfully submitted,

JAFFE, SNIDER, RAITT & HEUER
Professional Corporation

By: (s) BRIAN G. SHANNON
1800 First National Building
Detroit, MI 48226
(313) 961-8380

THEODORE SPEARMAN
THEODORE SPEARMAN, P.C.
975 E. Jefferson
Detroit, MI 48007

Attorneys for Petitioner
Terrance L. Guider

DATED: January 4, 1988

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

TERRANCE L. GUIDER,
Petitioner,

v.

RONALD SMITH AND THE CITY OF DETROIT,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

APPENDIX

Brian G. Shannon*
JAFFE, SNIDER, RAITT & HEUER,
Professional Corporation
1800 First National Building
Detroit, Michigan 48226
(313) 961-8380

Theodore Spearman
THEODORE SPEARMAN, P.C.
975 East Jefferson Avenue
Detroit, Michigan 48207

Attorneys for Petitioner Terrance L. Guider

*Counsel of Record

BOWNE OF DETROIT
615 SECOND AVENUE - DETROIT, MICHIGAN 48226 - (313) 964-1330

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Trial Court Ruling From The Bench
on Motion For Attorney Fees And Costs
(Dated June 15, 1984)

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

TERRANCE L. GUIDER,
Plaintiff,

vs.

C.A. No. 80-029-303-NO

RONALD SMITH AND
CITY OF DETROIT,
a Municipal corporation, jointly
and severally,
Defendants.

Hon. Paul S. Teranes

TRIAL COURT RULING FROM THE BENCH
ON MOTION FOR ATTORNEY FEES AND COSTS
(DATED JUNE 15, 1984)

(23)

* * *

THE COURT: It would seem that we are really getting down to the issue of the *Zarcone* case, *Zarcone* v *Perry,* or the *Milwe* case, which one should be applied in the case at Bar.

It would seem that the *Milwe* case adds the additional factor to *Zarcone,* both being out of the 2nd Circuit, of the brightness of the prospects of success.

And, Mr. Spearman, you mentioned that it was mediated at $30,000.00 where there is a question of, does that mean that it is a brightness of success. Maybe in this (24) jurisdiction $30,000.00 would be considered a dim success and then in another area in Ogallala, Nebraska that may be considered a very substantial fee.

MR. SPEARMAN: I would hope not.

Trial Court Ruling From The Bench
on Motion For Attorney Fees And Costs
(Dated June 15, 1984)

THE COURT: So it would go from jurisdiction to jurisdiction. I can remember the days when a $100,000.00 judgment for a quadruplegic was the biggest judgment ever issued in the County of Wayne and that's going back less than 20 years.

So as far as the $30,000.00 being a brightness of success, I don't know that it really shows that there is a dimness of success because it was $30,000.00.

I think the primary factor is first, weighing the *Northcross* and *Newman* standards with the *Zarcone* standards where you are talking about an individual versus the rights of a class, here we are talking about an individual. I can see your argument that you are enforcing the constitutional rights of the individual when it comes to the shooting of a police officer as you mentioned here and you mentioned in the case, the police officer may have the one right of capital punishment left in the State of Michigan. I think it was a term you used during the course of the trial.

So you are talking about, granted, an important constitutional issue when you are talking about the rights (25) of police officers to shoot a fleeing felon.

As far as the possibility of success is concerned, you mentioned about the fact that — Mr. Spearman I am referring to when I said "you" — Mr. Spearman mentioned the factor of bringing an action against a police officer who was engaged in shooting a fleeing felon, where you begin with two strikes against you, as it were, when you are dealing with the Police Department.

Again looking at this jurisdiction and as the City of Detroit may know, the City of Detroit has not been that successful. I don't have any statistics, but they've had some very large judgments against their police department and police officers. As a matter of fact, I think the City Council has criticized on a number of occasions, the fact that the City of Detroit is considered to be a fair game, as it were, for lawsuits. So as far as suing the Police

Trial Court Ruling From The Bench
on Motion For Attorney Fees And Costs
(Dated June 15, 1984)

Department, I don't know if statistically you could say that your success is just very minimal when it comes to suits against police officers in the City of Detroit.

I can't quote statistics as to winning and losing, but I don't believe that the recovery rate is minimal when it comes to suits against Detroit police officers and the Detroit Police Department.

So you are really looking, as I say, *Zarcone* vis-a-vis *Milwe,* and from what I see of *Milwe,* the big (26) factor is — one of the big factors is likeliness of success.

MR. SPEARMAN: That's kind of, I think, your Honor, a case by case analysis of looking at the facts of each case.

THE COURT: And the facts in this case, if they are taking the brightness of success aspect, I think you just have to look at, you know, what chance of success do you have and it is many times a mediator, even if you want to use a mediation standard, a mediator may mediate a case at no cause or $1.00 or $10.00. Here they mediated it at $30,000.00. Like I said, it may be a question of, is $30,000.00 a large amount or not a large amount and that may be all relative.

But I am still looking at the *Northcross* case of a mind that the Courts are really concerned with the rights of a group. They are concerned with whether or not a person would be able to bring this action in the first place, how much money is involved.

Here there was a request for a large amount of money, obviously at the outset a request for a large amount of money for recovery for damages and it really enforces the right of, the civil rights of one individual rather than a group, plus there was a recovery on a contingent fee basis which is another aspect, was the (27) attorney paid a significant amount of money or an amount of money which would fairly be a return on his efforts.

Trial Court Ruling From The Bench
on Motion For Attorney Fees And Costs
(Dated June 15, 1984)

I know Mr. Spearman had an awful lot of effort in this case. He spent many hours in preparation and during the course of the trial. But the return has been rather successful.

It might even make a difference if the return was minimal, if the jury found there was a violation of civil rights with a minimal return, that might make a difference of this Court's view of whether or not attorney fees should be awarded for the efforts that were put forth by Mr. Spearman in order to enforce the civil rights of Mr. Guider.

So looking at all the factors, and even in the light of the *Milwe* case, I think this is more of a situation for *Zarcone* v *Perry* where you, when looking at all the factors, you have a situation where you are really talking about individual torts even though civil rights may be involved, the violation of civil rights of an individual versus a class, an individual bringing an action for money. In *Zarcone* where it was actually a violation of a coffee vendor's civil rights, as much as in this case, I think the whole factor would be the brightness of success and here with all of the circumstances that the opportunity for success was not that dim that the attorney would not (28) take the case of Mr. Guider and bring an action against the City to enforce Mr. Guider's constitutional rights.

So for all those reasons I will deny the motion for attorney fees in this mattter.

* * *

Order Denying Motion for Attorney Fees
(Dated July 13, 1984)

ORDER DENYING MOTION FOR ATTORNEY FEES (DATED JULY 13, 1984)

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

TERRANCE L. GUIDER,
Plaintiff,

vs.

RONALD SMITH AND
CITY OF DETROIT,
a Municipal corporation, jointly
and severally,
Defendants.

C.A. No. 80-029-303-NO

Hon. Paul S. Teranes

ORDER DENYING MOTION FOR ATTORNEY FEES

At a session of said Court held in the City-County Building, Detroit, Michigan on July 13, 1984

PRESENT: Honorable Paul S. Teranes
Circuit Court Judge

Plaintiff Terrance L. Guider having filed a motion for attorney fees under 42 U.S.C. §1988, and an answer in opposition having been filed, and the Court having reviewed the briefs and heard the argument of counsel on June 15, 1984, for the reasons stated on the record on June 15:

IT IS HEREBY ORDERED that the motion is denied.

(s) PAUL S. TERANES
Circuit Court Judge

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Opinion of the Michigan Court of Appeals
(Dated January 6, 1987)

OPINION OF THE MICHIGAN COURT OF APPEALS (DATED JANUARY 6, 1987)

GUIDER v SMITH

Docket Nos. 77323, 79507. Submitted December 17, 1985, at Detroit. Decided January 6, 1987. Leave to appeal applied for.

Terrance L. Guider brought in Wayne Circuit Court a 42 USC 1983 action for damages against Ronald Smith, a Detroit police officer, and the City of Detroit, alleging that his federal civil rights had been violated when Smith shot him. Plaintiff was shot as he attempted to flee from the site of a reported breaking and entering. Plaintiff was not armed. Plaintiff's theory of recovery was that Smith's use of deadly force to apprehend him was excessive and unnecessary under the circumstances and amounted to a deprivation of his constitutional rights. The trial court, Paul S. Teranes, J., granted a directed verdict in favor of the City of Detroit on the basis that plaintiff failed to show gross negligence or deliberate indifference on the part of the city in the training or supervising of its police officers in the use of deadly force, but denied Smith's motion for a directed verdict. The jury returned an award in favor of plaintiff in the amount of $472,000. The trial court refused to award plaintiff attorney fees. Defendant Smith appealed. Plaintiff cross-appealed.

The Court of Appeals *held:*

Affirmed in part, reversed in part and remanded.

C. W. SIMON, JR., J., would hold:

REFERENCES

Am Jur 2d, Appeal and Error § 778.

Am Jur 2d, Civil Rights §§ 16, 19, 269.

Am Jur 2d, Public Officers and Employees §§ 360, 366.

Am Jur 2d, Trial §§ 202 *et seq.*

Construction and application of Civil Rights Attorney's Fees Awards Act of 1976 (amending 42 USCS § 1988), providing that court may allow prevailng party, other than United States, reasonable attorney's fee in certain civil rights actions. 43 ALR Fed 243.

Police action in connection with arrest as violation of Civil Rights Act, 42 USCS § 1983. 1 ALR Fed 519.

Modern status: right of peace officer to use deadly force in attempting to arrest fleeing felon. 83 ALR3d 174.

See also the annotations in the Index to Annotations under Appeal and Error; Arguments of Counsel.

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Opinion of the Michigan Court of Appeals
(Dated January 6, 1987)

1. The trial court properly refused to give the jury instruction relative to the duty of a person who knows that he is being lawfully arrested to refrain from resisting that arrest, since the question in this case was not whether a lawful arrest could be made but rather whether the degree of force used by the officer in effecting the arrest was reasonable under the circumstances.

2. A police officer is entitled to qualified immunity in a 42 USC 1983 action for money damages if the officer acted in good faith. While there was evidence that defendant Smith was aware of the police department regulation which allowed an officer to use his weapon to arrest a fleeing felon, Smith never testified that at the time of the shooting he was relying in good faith on the legality and constitutionality of the regulation.

3. The record fails to establish that the remarks of counsel were so egregious as to warrant a new trial.

4. The trial court did not abuse its discretion in permitting the jury to see the enlargements of the diagrams contained in an exhibit which had been admitted.

5. Reversal is not mandated by reason of the sidebar conversation between the judge and one of plaintiff's witnesses.

6. Defendant Smith's motion for a directed verdict was properly denied.

7. The damages award was not excessive or unreasonable in light of the medical evidence.

8. Since the Detroit Police Department policy relative to the use of weapons in making arrests on nonviolent felons is unconstitutional, it was error for the trial court to grant the directed verdict in favor of the City of Detroit.

9. While attorney fees are generally awarded in 42 USC 1983 actions, where, as here, the prospects of a significant recovery would be sufficient to make counsel easily obtainable, a trial court, in its discretion, may refuse to award attorney fees. There was no abuse of discretion in denying attorney fees.

M. J. KELLY, J., concurred in the result reached by Judge SHAON, but wrote separately on the question of the failure of the trial court to instruct the jury on the affirmative defense of qualified immunity. He would hold that, since the jury was accurately instructed on the state of the law regarding the use by a police officer of deadly force as it applied at the time the incident occurred, the trial court was not obligated to instruct on the qualified immunity defense.

BRONSON, J., did not participate.

Opinion of the Michigan Court of Appeals
(Dated January 6, 1987)

OPINION OF C. W. SIMON, J.

1. CIVIL RIGHTS — POLICE OFFICERS — QUALIFIED IMMUNITY — GOOD FAITH.

A police officer who is a defendant in a 42 USC 1983 civil rights action for damages based on a claim that the shooting of the plaintiff by the police officer denied the plaintiff his civil rights is entitled to a qualified immunity if the officer acted in good faith; the good faith necessary to warrant a qualified immunity is not shown where the officer fails to present evidence at trial that, at the time of the shooting, he believed that the shooting of the plaintiff was lawful.

2. APPEAL — ATTORNEY MISCONDUCT — FAIR TRIAL.

The Court of Appeals will generally not reverse on the basis of attorney misconduct unless the alleged misconduct evidences a deliberate course of conduct on the part of the offending attorney aimed at preventing the opposing party from receiving a fair and impartial trial.

3. TRIAL — OPENING STATEMENT.

Counsel is entitled to make a full and fair opening statement of his case, including both the facts that he intends to prove and the relevant law; what constitutes a fair and proper opening statement is left to the sound discretion of the trial court.

4. CIVIL RIGHTS — MUNICIPAL CORPORATIONS.

The policy of the Detroit Police Department which permits Detroit police officers to use deadly force against nonassaultive and unarmed citizens suspected of committing a crime against property which involves no violence or threat of violence is unconstitutional because it permits an unnecessarily severe and excessive response that is all out of proportion to any danger to the community; accordingly, it is error to grant a directed verdict in favor of the City of Detroit in a 42 USC 1983 civil rights action arising out of the shooting of a citizen by a police officer who shot the person in reliance upon that police department policy.

5. CIVIL RIGHTS — ATTORNEY FEES.

A trial court, in the exercise of its discretion, should ordinarily award attorney fees to a plaintiff who has been successful in a 42 USC 1983 civil rights action for damages; however, a trial court may properly deny an award for attorney fees where, at the time of the bringing of the suit, the substantive claim was so strong on the merits as to result in a substantial award such that private counsel could be easily and readily obtainable (42 USC 1988).

Opinion of the Michigan Court of Appeals
(Dated January 6, 1987)

CONCURRENCE BY M. J. KELLY, P.J.

6. CIVIL RIGHTS — POLICE OFFICERS — QUALIFIED IMMUNITY.

A police officer who is a defendant in an action for damages brought pursuant to 42 USC 1983 for violation of the plaintiff's civil rights is shielded from civil liability for damages if the officer's conduct was discretionary in nature and consistent with constitutional law as established at the time the conduct occurred; the relevant inquiries in establishing this qualified immunity are the established state of the law at the time the conduct occurred and the officer's compliance with that law.

Jaffe, Snider, Raitt & Heuer, P.C. (by *Brian G. Shannon* and *Carol A. Osborne*), and *Theodore Spearman*, for plaintiff.

Cooper & Fink (by *Daniel S. Cooper* and *David H. Fink*), for defendants.

Before: M. J. KELLY, P.J., and BRONSON and C. W. SIMON, JR.,* JJ.

C. W. SIMON, JR., J. On August 11, 1980, plaintiff, Terrance Guider, filed a complaint in Wayne Circuit Court against the City of Detroit and Detroit police officer Ronald Smith, alleging that the defendants violated his federal civil rights and seeking damages pursuant to 42 USC 1983. Plaintiff was shot by officer Smith as he fled from the scene of an apparent breaking and entering. Plaintiff's theory of recovery was that Officer Smith's use of deadly force to apprehend him was excessive and unnecessary under the circumstances and amounted to a deprivation of his constitutional rights.

A jury trial was held in the case commencing on September 12, 1983. After the plaintiff had presented his case, the trial court granted a directed verdict to defendant City of Detroit. The court

* Circuit judge, sitting on the Court of Appeals by assignment.

concluded that the evidence was insufficient to show gross negligence or deliberate indifference on the part of the city in the training and supervising of its police officers in the use of deadly force. Thereafter, the case went to the jury concerning the liability of Officer Smith. On October 18, 1983, the jury found in favor of the plaintiff and awarded him $472,000 in compensatory damages. Both sides appeal as of right raising numerous issues.

I

On April 20, 1978, plaintiff, then an eighteen-year-old youth with no criminal record, received a telephone call from a friend, Jeff Neely, who asked the plaintiff to help him remove his belongings from a house Neely claimed he had been sharing with his girlfriend. Following Neely's directions, plaintiff parked his car behind a house that Neely claimed was his girlfriend's. They entered at the side of the house. On plaintiff's third trip outside with Neely's alleged belongings, plaintiff saw a car with its lights off creeping down the alley towards the house. Fearing that the occupants of the house were returning, he dropped what he was carrying and ran. The next thing he remembered was that he was face down on the ground with somebody over him telling him to lie still because he had been shot. Plaintiff sustained serious injuries as a result of the shooting.

Defendant Smith testified that he became a police officer in 1974. On April 20, 1978, he was one of four members of a cruiser unit assigned to the 13th Precinct. That night his unit got a call to respond to "1145 Hague, two black males, B & E, the rear door." The radio call also said it was the first house on the alley. The officers pulled up in

the alley behind the house with their lights off. They saw two black males in the back yard who immediately took off running. Defendant chased after the plaintiff and yelled "Halt, police!" three times. After the third time, Officer Smith fired one shot at the plaintiff striking him in the neck. Officer Smith testified that he fired because he was afraid he would lose the suspect between two houses where, for his own safety, he would not be able to pursue as fast. Officer Smith did not see anything to lead him to believe that the plaintiff was armed. An internal police department investigation concluded that the shooting was justified.

II

Defendant Smith's first claim of error concerns the trial court's refusal to give certain jury instructions. Initially, defendant claims that the trial court erred in refusing to read SJI2d 115.09 in its entirety. After reviewing the record, I cannot agree.

SJI2d 115.09 states:

> If a person has knowledge, or by the exercise of reasonable care should have knowledge, that he or she is being lawfully arrested by a law enforcement officer, it is the duty of that person to refrain from resisting the arrest.
>
> An arresting officer may use such force as is reasonably necessary to effect a lawful arrest. However, an officer who uses more force than is reasonably necessary to effect a lawful arrest commits a battery upon the person arrested to the extent the force used was excessive.

The trial court read to the jury the second paragraph of SJI2d 115.09 verbatim, except that the trial court substituted the word "wrong" for "bat-

tery." The first paragraph of the instruction was not read to the jury. After jury instructions were completed, defense counsel objected that the judge read only the second paragraph of SJI2d 115.09. The trial court and plaintiff's counsel thought that they had all agreed only to read the second paragraph, but defense counsel remembered differently. The trial court noted the defendant's objection, but the jury was not further instructed.

Generally, a requested and applicable standard jury instruction should be given by the trial court. MCR 2.516(D)(2). However, whether a particular requested instruction is applicable and accurately states the law based on the individual characteristics of a given case is left to the sound discretion of the trial court. *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985). Further, the Court in *Johnson* stated that a reviewing court should not reverse for a violation of MCR 2.516 unless it concludes that noncompliance with the rule resulted in such unfair prejudice that the failure to vacate the jury award would be inconsistent with substantial justice. 423 Mich 327.

Defendant argues that the first paragraph of SJI2d 115.09 was applicable for two reasons. First, defendant maintains that the instruction was applicable because whether the police officer's force was reasonable is related both to the right of the police officer to pursue and the duty of the fleeing felon to submit. Second, defendant asserts the instruction was applicable because otherwise the jury might infer the existence of a constitutional right to escape. However, plaintiff maintains that the instruction was simply not applicable because his breach of the duty to submit to an arrest was irrelevant to the issue of whether Officer Smith's use of deadly force violated his constitutional rights. I agree with the plaintiff.

Concerning the liability of Officer Smith, the jury was required to determine whether the degree of force employed by Smith was reasonable under the circumstances. The fact that plaintiff may have had a duty to submit to a lawful arrest is irrelevant to the determination of whether the force used by Officer Smith was reasonable. Defendant has cited no case which states that a fleeing felon's duty to submit to a lawful arrest makes the use of deadly force more reasonable. In fact, the United States Supreme Court has suggested that deadly force cannot be used on a fleeing felon who poses no serious threat of harm. *Tennessee v Garner,* 471 US —; 105 S Ct 1694; 85 L Ed 2d 1 (1985). Thus, the fact that the plaintiff had a duty to refrain from resisting arrest is not relevant to the determination of whether the force used was reasonable, and therefore the first paragraph of SJI2d 115.09 was properly excluded from the jury instructions. Further, we reject defendant's contention that the instructions read even remotely suggested to the jury that the plaintiff had a constitutional right to escape.

Defendant also asserts that the trial court erred by refusing to give an instruction to the jury regarding the qualified good-faith immunity to actions under 42 USC 1983. While defense counsel apparently never offered a specific instruction on good-faith immunity under § 1983, she did object to the fact that the court's instruction regarding the use of deadly force did not contain the "good faith defense as enunciated in *Harlow*" or the "immunity defense under 1983."

If supported by the evidence and under certain circumstances, a police officer is entitled to qualified immunity to a § 1983 action for money damages if the officer acted in good faith. See *Harlow v Fitzgerald,* 457 US 800; 102 S Ct 2727; 73 L Ed 2d

396 (1982); *Landrum v Moats*, 576 F2d 1320 (CA 8, 1978), cert den 439 US 912 (1978). In *Harris v Pirch*, 677 F2d 681, 686 (CA 8, 1982), the Court stated:

> In § 1983 actions for damages defendants are entitled to a qualified immunity from liability based on a good faith belief in the propriety of their actions and reasonable grounds for that belief. *Procunier v Navarette*, 434 US 555; 98 S Ct 855; 55 L Ed 2d 24 (1978); *Scheuer v Rhodes*, 416 US 232; 94 S Ct 1683; 40 L Ed 2d 90 (1974). Therefore, "[w]hen a court evaluates police conduct relating to an arrest, its guideline is good faith and probable cause." *Id.* at 245 . . . . "Thus, even though a police officer may not have chosen the wisest or most reasonable course of action, he will not be civilly liable if his conduct is based on a reasonable and good faith belief that it was necessary under the circumstances. [*Glasson v Louisville*, 518 F2d 899, 910 (CA 6, 1975).]"

In this case, I believe that, if the record indicates that testimony was offered to support a good faith defense, then Officer Smith would have been entitled to an instruction on the defense. After reviewing the record, however, I conclude that the defendant did not give any testimony which would have supported a good faith defense. Officer Smith's defense at trial was that the force he used to make the arrest was necessary and therefore justified. The defendant clearly testified that he believed the shooting was necessary. However, the defendant did not testify that he believed that it was lawful for him to shoot the plaintiff. At trial, he indicated that he was aware of a police department regulation which allowed an officer to use his weapon to effectuate the arrest of a fleeing felon. Defendant did not testify, however, that when he shot the plaintiff he relied in good faith on the

legality and constitutionality of the regulation. Defendant's choice appears to have been one of trial strategy. Thus, since the testimony did not establish that the defendant believed that shooting the plaintiff was lawful, naturally there was no testimony to show that it was reasonable for him to believe this. Therefore, defendant was not entitled to a good faith immunity instruction.

Next, defendant argues that during the course of trial the attorney for the plaintiff repeatedly injected irrelevant and inflammatory comments which allegedly served to prejudice the jury against the defendant. The allegations of misconduct concern numerous statements made by plaintiff's counsel during opening and closing arguments and during trial that the defendant maintains were so egregious as to warrant a new trial. I disagree.

When reviewing an appeal asserting improper conduct of an attorney, this Court must first determine whether or not the claimed error was, in fact, error and, if so, whether it was harmless. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982). Generally, this Court will not reverse unless the alleged misconduct evidences a deliberate course of conduct on the part of the offending attorney aimed at preventing the opposing side from receiving a fair and impartial trial. *Kokinakes v British Leyland, Ltd*, 124 Mich App 650, 655; 335 NW2d 114 (1983), lv den 419 Mich 867 (1984). However, this Court will not hesitate to reverse where "the remarks of counsel were of such a nature as to deflect the attention of the jury from the issues involved and had a controlling influence upon its verdict." *Wayne Co Road Comm'rs v GLS LeasCo, Inc*, 394 Mich 126, 134, n 6; 229 NW2d 797 (1975).

Concerning plaintiff's opening statement, defen-

dant complains that plaintiff's counsel improperly injected his own personal beliefs, interpretation of the law, and engaged in otherwise inflammatory conduct. Plaintiff's attorney's opening statement consumed fifty-eight pages of transcript. Defendant's counsel objected thirteen different times. During the course of plaintiff's opening argument, the trial court instructed the jury eight times that the statements of the attorneys were not to be considered as evidence or testimony.

During opening argument, counsel is entitled to "make a full and fair statement of [his] case and the facts [he] intends to prove." MCR 2.507(A). This includes a statement of the relevant law upon which the attorney bases his case. See *Fosdick v Van Arsdale*, 74 Mich 302, 304-305; 41 NW 931 (1889). What constitutes a fair and proper opening statement is left to the sound discretion of the trial court. *Coon v Williams*, 4 Mich App 325, 334; 144 NW2d 821 (1966), lv den 378 Mich 752 (1967). In this case, I can find no abuse of discretion that requires reversal. I believe that any error was sufficiently cured by the trial court's repeated instruction to the jury that the statements of counsel were not evidence or testimony and that the court, not the attorneys, would inform the jury of the applicable law.

Defendant also complains of several other allegations of misconduct, including personal attacks by plaintiff's counsel on defense counsel's honesty and integrity, the mentioning of multi-million dollar awards, appeals to sympathy and the use of so-called extravagant language. However, many of the alleged improper comments were never objected to, and, therefore, appellate review is precluded.

Further, as previously indicated, to warrant reversal the misconduct must be egregious enough to

have diverted the jury from considering the merits of the case. *GLS LeasCo, supra.* After reviewing the record in this case I find no grounds for reversal. To be sure, this was a hard-fought trial with inappropriate remarks being made by both sides during the course of the three-week trial. The trial was marked by vigorous and, at times, seemingly hostile advocacy on both sides. In fact, after reviewing the transcript, one could be left with the impression that counsel for both sides spent as much energy verbally attacking each other and each other's clients as they did presenting the merits of their case. To the extent that defendant's counsel suffered personal attacks, she fought back blow for blow. Thus, I conclude that neither side was unfairly prejudiced and the comments from each tended to cancel the other's out.

Therefore, I find that, when the record is reviewed in its entirety, it does not appear that plaintiff's counsel engaged in a course of conduct which was deliberately calculated to prejudice the jury and deny defendant a fair trial. Getting carried away in argument is by no means rare and will not be the basis for reversal when the trial transcript indicates an otherwise fair trial.

Next, defendant asserts that the trial court committed error by allowing the plaintiff to show to the jury certain proposed exhibits. The disputed exhibits, 79, 80 and 81, involved medical evidence. Exhibit 81 was a medical journal article describing certain surgical procedures used to correct and treat the plaintiff's injuries, and exhibits 79 and 80 were enlargements of diagrams contained in the article. Only exhibit 81 was actually admitted into evidence. Defendant argues that the display of the exhibits was cumulative and prejudicial, warranting a new trial. I find no error.

A decision whether to admit certain evidence

rests within the sound discretion of the trial court, and that decision will not be set aside absent an abuse of discretion. *Hadley v Trio Tool Co*, 143 Mich 319; 372 NW2d 537 (1985). When reviewing a trial court's decision to allow the jury to be presented with certain evidence, this Court will not assess the weight and value of the evidence, but will only determine whether the evidence was of such a nature that it could be properly considered by the jury. *Detroit v Hamtramck Community Federal Credit Union*, 146 Mich App 155, 158; 379 NW2d 405 (1985).

In this case, it should be initially noted that defendant actually withdrew his initial objection to the admission of exhibit 81 and therefore we conclude the exhibit was properly admitted. Exhibits 79 and 80 were never actually admitted into evidence but were used as illustrations during the testimony of two of plaintiff's treating physicians. Defendant asserts that exhibits 79 and 80 were cumulative since they both were found in exhibit 81. Under MRE 403, the trial court may in its discretion exclude evidence which is cumulative. *Mumaw v Mumaw*, 124 Mich App 114, 121; 333 NW2d 599 (1983). Here, I cannot say that the trial court abused its discretion in allowing the physicians to refer to exhibits 79 and 80. Certainly, permitting the physicians to testify while referring to the enlargements of the diagrams of the injury to plaintiff's neck undoubtedly made their testimony clearer.

I also disagree with the defendant's arguments that the diagrams were irrelevant and more prejudicial than probative due to their alleged gruesomeness. After reviewing the exhibits, I cannot conclude that the anatomically accurate drawings of plaintiff's neck and mouth depicting plaintiff's wound were particularly gruesome. Finally, I be-

lieve that the exhibits were relevant because they had a tendency to make more probative the facts surrounding the injuries suffered by the plaintiff. MRE 401. Therefore, the trial court committed no error in permitting the jury to see the exhibits.

Defendant also complains of an incident which occurred between the trial judge and a witness for the plaintiff. While the jury was filing out of the courtroom for an afternoon break, the trial judge started a conversation with the witness who had been testifying, James Fyfe, one of the plaintiff's expert witnesses in police tactics and training. The court stated that the conversation concerned congressional hearings in Washington, D.C. at which Fyfe had testified and which were unrelated to the case at bar. The defendant subsequently moved for a mistrial on the grounds that the conversation would have lent undue weight to that witness' testimony.

Following the defendant's motion, the trial court inquired of the jury whether they saw him speaking with the witness and whether they had heard any of the conversation. Three jurors indicated that they had seen the judge speaking with the witness, but each indicated that no part of the conversation had been heard. The court then instructed the jury that they should disregard any inference that they might draw from the fact that the conversation took place concerning what weight should be given to the testimony of that witness. On appeal, defendant states that, rather than curing any error, the instruction only reinforced the implication that the trial court endorsed Fyfe's testimony.

I believe that defendant's claim that he is entitled to a new trial based on the conversation between the judge and witness is without merit. Defendant has failed to show any actual bias on

the part of the trial judge or that he suffered any actual prejudice as a result of the incident. The record clearly reveals that the conversation between the court and the witness did not favor either side or place undue weight on that witness' testimony. Moreover, I find that the trial court's prompt curative instructions adequately cured any error which might have possibly resulted from the incident.

Following the presentation of the plaintiff's case, both the City of Detroit and defendant Smith moved for a directed verdict. The court denied defendant Smith's motion for a directed verdict on the ground that there were questions of fact regarding whether the use of deadly force was reasonably necessary. Defendant asserts that his motion should have been granted. I disagree.

In deciding whether a directed verdict is proper, the standard of review is whether, taking the evidence in a light most favorable to the nonmoving party, a prima facie case of liability has been established. *Koski v Vohs*, 137 Mich App 491, 508; 358 NW2d 620 (1984), rev'd 426 Mich 424 (1986). In order to establish a prima facie case of liability under 42 USC 1983, the plaintiff was required to establish that defendant, acting under the color of state law, deprived him of a right secured by the constitution or laws of the United States. *Napier v Jacobs*, 145 Mich 285; 377 NW2d 879 (1985). In this case, plaintiff attempted to show that the shooting was per se unreasonable under the Fourteenth Amendment and unreasonable under the facts of the case.

In *Tennessee v Garner*, 471 US —; 105 S Ct 1694; 85 L Ed 2d 1 (1985), the United States Supreme Court recently considered the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon.

The case involved a Tennessee statute that provided: "[I]f, after notice of the intention to arrest the defendant, he either flees or forceably resists, the officer may use all necessary means to effect the arrest." Tenn Code Ann § 40-7-108 (1982); *Garner, supra*, 85 L Ed 2d 5. In *Garner*, the police shot and killed an unarmed burglary suspect as he tried to escape the scene.

The Supreme Court held that the apprehension of a felony suspect by the use of deadly force was a seizure subject to the reasonableness requirement of the Fourth Amendment.

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.
>
> It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. As applied in such

circumstances, the Tennessee statute would pass constitutional muster. [85 L Ed 2d 9-10.]

Garner has been applied retroactively by the federal courts. See *Acoff v Abston,* 762 F2d 1436 (CA 11, 1985).

Michigan presently follows the common-law rule concerning the use of deadly force which permits the use of deadly force in pursuit of a fleeing felon. *Werner v Hartfelder,* 113 Mich App 747, 753; 318 NW2d 825 (1982). Testimony at trial revealed that Detroit police regulations permit an officer to use deadly force in pursuit of a burglary suspect. Whether such a rule is still viable in light of *Garner* is questionable. Moreover, the evidence supports the trial court's finding that the plaintiff presented a prima facie showing that the defendant's use of deadly force was unreasonable and, therefore, in violation of plaintiff's constitutional rights. There was testimony that other officers and tracking dogs were in the vicinity and that defendant was carrying a portable radio which he could have used to summon back-up help. While defendant testified that if plaintiff had run between the houses he would have lost him, defendant never testified that plaintiff actually turned in that direction prior to the shooting. Therefore, I believe that the question of the reasonableness of defendant's conduct was properly left to the jury and the motion for a directed verdict was correctly denied.

Finally, defendant argues that the jury's award of $472,000 in compensatory damages to the plaintiff was excessive and unfair, warranting a new trial or remittitur. Defendant reasons that the absurdity of the award is indicated by the fact that the mediation panel awarded plaintiff only $30,000. I find defendant's argument to be without merit.

In *Precopio v Detroit*, 415 Mich 457, 465; 330 NW2d 802 (1982), our Supreme Court stated:

> In reviewing damage awards in cases tried to juries, this Court has asked whether the award shocks the judicial conscience, appears unsupported by the proofs, or seems to be the product of improper methods, passion, caprice, or prejudice; if the amount awarded falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation for the injury sustained, the verdict has not been disturbed.

The Court also refused to evaluate an award by comparison to an unaccepted mediation award, finding that such a comparison frustrates the public policy that encourages settlements and because mediation awards oftentimes merely set a figure in order to facilitate settlement rather than to accurately assess damages. *Id.*, 473-474.

In this case, it cannot be said that the award shocks the judicial conscience or is unsupported by the evidence. Defendant ignores the medical testimony which indicated the extensive nature of plaintiff's injuries and his continuing problems. Further, there is no exact mathematical formula which would allow a jury to precisely determine what award will compensate an injured plaintiff for the pain and suffering resulting from his injuries. Here, the injuries were extensive and serious and the amount of pain and suffering endured by the plaintiff was undoubtedly great. Therefore, it cannot be said that the damage award was excessive or unreasonable in light of the medical evidence.

Since none of the issues raised by defendant Smith require reversal of the jury's verdict and

award, the judgment in favor of the plaintiff should be affirmed.

III

On cross-appeal, plaintiff raises two issues. First, plaintiff asserts that the trial court improperly granted the City of Detroit's motion for a directed verdict. Plaintiff also asserts that the trial court abused its discretion in refusing to award him attorney fees under the federal civil rights act.

The trial court granted a directed verdict in favor of the city based on a finding that plaintiff had failed to prove a constitutional violation was caused by an official policy or custom of a municipality, and because the plaintiff had not shown that the city was reckless or grossly negligent in training the defendant. On appeal, plaintiff argues that he did establish a prima facie case of liability. I agree.

A directed verdict is only appropriate where the plaintiff has failed to establish a prima facie case of liability. *Caldwell v Fox*, 394 Mich 401; 231 NW2d 46 (1975). In *Monell v Dep't of Social Services of the City of New York*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978), the United States Supreme Court held that municipalities are persons within the meaning of 42 USC 1983 that can be held directly liable for constitutional violations committed pursuant to a governmental custom, practice or policy. See also *Moore v Detroit*, 128 Mich App 491; 340 NW2d 640 (1983). Since a city police department's customs and policies are considered to be policies of the city itself, it may be liable under *Monell* when its employees implement those policies and thereby violate constitutional rights. See *Taylor v Collins*, 574 F Supp 1554 (ED Mich, 1983).

In this case, the testimony established that it was the policy of the Detroit Police Department to allow the use of deadly force against nonassaultive and unarmed citizens suspected of committing a crime against property involving no violence or threat of violence. In light of *Garner*, I believe that the police rule is unconstitutional under the Fourth and Fourteenth Amendments. While the Detroit rule is more limited than the Tennessee statute, it still permits the use of deadly force against individuals who have committed a crime against property only, whether violent or not. Therefore, I conclude that the policy as implemented in this case is unconstitutional because it permits an unnecessarily severe and excessive police response that is out of all proportion to the danger to the community. Accord, *Werner v Hartfelder, supra*, pp 755-758 (T. M. BURNS, J., dissenting).

Here, the plaintiff argued to the trial court that a directed verdict was improper because the city could be liable to the plaintiff based on the Sixth Circuit's opinion in *Garner v Memphis Police Dep't*, 710 F2d 240, 244 (CA 6, 1983), aff'd sub nom *Tennessee v Garner*, 471 US —; 105 S Ct 1694; 85 L Ed 2d 1 (1985), which held, like the Supreme Court, that the Tennessee statute permitting the use of deadly force against a nonviolent fleeing felon was unconstitutional under the Fourth and Fourteenth Amendments. Thus, the issue was preserved for appeal. I conclude that the city should have been liable based on its unconstitutional policy that was implemented by Officer Smith and the trial court clearly erred in granting a directed verdict to the city. Therefore, the case must be remanded to the trial court for further proceedings.

Concerning the trial court's refusal to grant the

plaintiff attorney fees, I find no abuse of discretion. Pursuant to 42 USC 1988, it is within the discretion of the trial court to determine whether attorney fees should be awarded to the prevailing party. While a successful plaintiff should ordinarily recover his attorney fees under the federal civil rights act, an award is certainly not mandatory under all circumstances. In this case, the trial court refused to grant attorney fees on the grounds that the plaintiff had bright prospects of a substantial recovery in his quasi-tort constitutional claim under § 1983 and, therefore, an award of attorney fees was not warranted. See *Kerr v Quinn*, 692 F2d 875 (CA 2, 1982); *DiFilippo v Morizo*, 759 F2d 231 (CA 2, 1985).

While the bright prospects rule has not been universally accepted by the federal courts, see *Cooper v Singer*, 719 F2d 1496 (CA 10, 1983), it is supported by a substantial body of case law. The bright prospects rule requires that the trial court determine whether the substantive claim was so strong on the merits as to likely result in a substantial judgment such that private counsel could be easily and readily obtainable. *DiFilippo, supra.* Thus, it must be determined whether, absent an award of attorney fees, a similarly situated plaintiff would be deterred from enforcing his constitutional rights. *Milwe v Cavuoto*, 653 F2d 80 (CA 2, 1981). Such a situation should be distinguished from a case seeking injunctive relief where attorney fees ordinarily should be recovered because otherwise certain civil rights violations might go unchecked.

In this case, I cannot say that the trial court abused its discretion in denying plaintiff attorney fees. The court noted that the plaintiff was enforcing an individual right and through a contingency fee arrangement was able to obtain competent

counsel. Further, the court determined that plaintiff's case had a bright prospect for success given the circumstances of the shooting. I do not believe that the trial court erred in its evaluation of the various factors and, therefore, I would affirm the denial of attorney fees.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

M. J. KELLY, P.J. *(concurring).* I concur with the result reached by Judge SIMON, but write separately regarding the trial court's failure to instruct the jury on the affirmative defense of qualified immunity.

Under federal law, police officers are shielded from civil liability for damages recoverable in a § 1983 action if the officer's conduct was discretionary in nature and consistent with constitutional law as established at the time the conduct occurred. This principle of qualified immunity is sometimes referred to as "good faith immunity," which implies that the state of mind of the police officer is relevant. However, the only inquiries relevant to the defense of qualified immunity concern the established state of the law at the time the incident occurred and the officer's compliance with that law. *Harlow v Fitzgerald,* 457 US 800; 102 S Ct 2727; 73 L Ed 2d 396 (1982), and *Bates v Jean,* 745 F2d 1146 (CA 7, 1984). Defendants in this case argue on appeal that error occurred when the jury was not instructed on the affirmative defense of qualified immunity because Officer Smith justifiably and in good faith relied upon the constitutionality of the Detroit Police Department's fleeing felon rule in shooting at plaintiff under the circumstances presented.

If the trial court had instructed the jury on the

constitutional use of deadly force as eventually defined under *Tennessee v Garner*, 471 US —; 105 S Ct 1694; 85 L Ed 2d 1 (1985), as announced by the Sixth Circuit at the time of trial in *Garner v Memphis Police Dep't*, 710 F2d 240 (CA 6, 1983), I would find that the omission of an instruction on the qualified immunity defense constitutes error requiring reversal. Under *Tennessee v Garner*, it is unconstitutional for a police officer to use deadly force unless the officer has probable cause to believe that defendant was armed or posed a threat to the officer or others. The fleeing felon rule in effect in Michigan at the time this incident occurred allows an officer to use deadly force where there is probable cause to believe that the person fleeing has committed murder, armed robbery, rape, kidnapping, arson, or has broken and entered an occupied dwelling. The trial court in this case did not instruct the jury under *Tennessee v Garner*, but instead upheld the constitutionality of the Detroit Police Department's fleeing felon rule and instructed the jury that Officer Smith's use of deadly force was lawful if consistent with that rule. Since the jury was accurately instructed on the state of the law regarding a police officer's use of deadly force as it applied at the time this incident occurred, I do not think the trial court was obligated to instruct on the qualified immunity defense and I therefore concur with Judge SIMON's decision to affirm.

BRONSON, J., did not participate.

Order of the Supreme Court of Michigan
(Dated October 6, 1987)

ORDER OF THE SUPREME COURT OF MICHIGAN (DATED OCTOBER 6, 1987)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 6th day of October in the year of our Lord one thousand nine hundred and eighty-seven.

80577
80578
80804

Present the Honorable
DOROTHY COMSTOCK RILEY,
Chief Justice
CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DENNIS W. ARCHER,
ROBERT P. GRIFFIN,
Associate Justices

TERRANCE L. GUIDER,
Plaintiff-Appellee,

v.

RONALD SMITH AND THE CITY OF DETROIT, a municipal corporation, jointly and severally,
Defendants-Appellants.

SC: 80577, 80578
COA: 77323
LC: 80-029303-NO

TERRANCE L. GUIDER,
Plaintiff-Appellant,

v.

RONALD SMITH AND THE CITY OF DETROIT, a municipal corporation, jointly and severally,
Defendants-Appellees.

SC: 80804
COA: 79507
LC: 80-029303-NO

Order of the Supreme Court of Michigan
(Dated October 6, 1987)

On order of the Court, the application for leave to appeal and the delayed application for leave to appeal are considered. The application for leave to appeal is GRANTED, limited to the issue whether the judgment against the individual defendant should be reversed based on the doctrine of qualified immunity. The delayed application for leave to appeal is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 6th day of October in the year of our Lord one thousand nine hundred and eighty-seven.

Corbin R. Davis
Clerk.

42 U.S.C. § 1988

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330.

Supreme Court, U.S.
FILED
FEB 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-1211

In The

Supreme Court of the United States

October Term, 1987

TERRANCE L. GUIDER,
Petitioner,

v.

RONALD SMITH and CITY OF DETROIT,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

RESPONDENTS' BRIEF IN OPPOSITION

DONALD PAILEN (P34444)
Corporation Counsel for the City of Detroit
1010 City-County Bldg.
Detroit, Michigan 48226

DANIEL S. COOPER (P12201)
DAVID H. FINK (P28235)*
THOMAS A. BISCUP (P40380)
Special Assistant Corporation Counsels
COOPER, FINK & ZAUSMER, P.C.
1141 First National Bldg.
Detroit, Michigan 48226
313/963-3873

Counsels for Respondents

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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No. 87-1211

In The

Supreme Court of the United States

October Term, 1987

TERRANCE L. GUIDER,

Petitioner,

v.

RONALD SMITH and CITY OF DETROIT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Ronald Smith and the City of Detroit, respectfully request that this Court deny the Petition for Writ of Certiorari, which seeks review of the Order of the Supreme Court of the State of Michigan, which denied Petitioner's Application for Leave to Appeal the decision of the Court of Appeals of the State of Michigan. The decision of the Supreme Court of Michigan is reported at 429 Mich. 858, 405 N.W.2d 126 (1987).

JURISDICTION

This Court has jurisdiction to review state court decisions in limited circumstances. That jurisdiction extends only to "[f]inal judgments or decrees rendered by

the highest court of a State in which a decision could be had . . . . " 28 U.S.C. § 1257 (1982). Petitioner seeks to have this Court review the refusal of the Michigan Supreme Court to exercise its discretionary jurisdiction to review cases. That refusal is not a "final judgment or decree" within the meaning of § 1257, and this Court does not have jurisdiction to review that decision.

STATEMENT OF THE CASE

Contrary to Supreme Court Rule 21.1(g), much of Petitioner's Statement of the Case is not "material to the consideration of the questions presented." However, in order to avoid any prejudice that may result from the inaccuracies contained in Petitioner's Statement, pursuant to Supreme Court Rule 34.2, Respondents' Statement of the Case will correct those inaccuracies.

Petitioner states that the facts in this case are "similar" to those in *Tennessee v. Garner*, 471 U.S. 1 (1985). Pet. for Cert., at 3. The instant case is distinguishable from *Garner*. In addition, factual similarities that may exist between this case and *Garner* are irrelevant to the issues presented in the Petition.[1]

Petitioner mischaracterizes the issues related to Respondent Smith's liability. Pet. for Cert., at 3 n.1. The issue is not whether Respondent Smith followed Detroit

[1]Questions regarding factual similarities and the retroactive application of *Garner, supra,* relate to the liability of Respondent City. As discussed in note 2, *infra,* these issues have not yet been finally resolved.

Police Department regulations, as Petitioner claims; rather, the issue currently pending before the Michigan Supreme Court is whether Respondent Smith was entitled to qualified good faith immunity under the standard established by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Petitioner also contends that he "will remain the prevailing party regardless of the Michigan Supreme Court's disposition of the qualified immunity issue in Smith's case." Pet. for Cert., at 4 n.2. This contention is based on an erroneous understanding of the proceedings in the Michigan Supreme Court. Petitioner believes that he has obtained a final judgment as to the liability of Respondent City:

> "Smith and the City applied to the Supreme Court of Michigan for leave to appeal and that Court agreed to hear a single issue, namely whether the judgment against Smith should be reversed based on the doctrine of qualified immunity. (30a). The Supreme Court declined to review the decision that the City was directly liable to Guider on *Garner* grounds for the unconstitutional police department rule." Pet. for Cert., at 4 (footnote omitted).

The City's liability to Petitioner on the basis of this Court's decision in *Garner, supra*, has not been finally established.[2] Respondents Smith and the City filed a

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[2]If the Michigan Supreme Court decides that Respondent Smith was entitled to qualified immunity and, therefore, that no constitutional violation occurred, then Respondent City may not be liable for Petitioner's injuries. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). If the Michigan Supreme Court rules in Respondent Smith's favor, but Respondent City is still

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single Application for Leave to Appeal to the Michigan Supreme Court on April 1, 1987. On October 6, 1987, the Michigan Supreme Court granted the Application for Leave to Appeal. Although the Court limited the issue to qualified immunity, that Court obtained jurisdiction over the issues presented by Respondents.[3] Mich. Ct. R. 7.302(F)(3). Jurisdiction over those issues remains with the Michigan Supreme Court until a decision by that Court.[4]

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REASONS FOR DENYING THE PETITION

I. THE PETITION IS JURISDICTIONALLY DEFECTIVE.

This Court's jurisdiction to review decisions of state courts extends only to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision

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held liable under *Garner, supra,* then issues related to the retroactive application of *Garner* will likely form the basis for a Petition for Writ of Certiorari to be filed with this Court. Petitioner thus will not necessarily remain the "prevailing party;" Petitioner's status will remain in doubt until the rest of the issues in this case are resolved.

[3]The attorney's fee issues presented by Petitioner have been pursued on appeal as a separate matter.

[4]On October 26, 1987, Petitioner filed a Motion with the Michigan Supreme Court. In that Motion, Petitioner asked that the Michigan Supreme Court bifurcate this case and remand to the trial court that portion of it relating to Respondent City's liability for immediate entry of judgment against Respondent City. On December 2, 1987, the Michigan Supreme Court entered its Order denying Petitioner's Motion. That Order establishes that there is no final judgment against Respondent City.

could be had. . . ." 28 U.S.C. § 1257 (1982); *see Market Street Railway Co. v. Railroad Comm'n,* 324 U.S. 548, 551 (1944). This jurisdiction does not extend to the refusal of a state supreme court to exercise its discretionary jurisdiction to review decisions of intermediate state appellate courts.

This Court has long held that, where a state supreme court has declined to review a case, the decision of the last court to decide the merits is "the highest court of a State in which a decision could be had . . ." for determining the extent of this Court's jurisdiction. In *Western Union Tel. Co. v. Crovo,* 220 U.S. 364 (1910), this Court stated:

> "The plaintiff in error has sued out two writs of error: one to the law and equity court of the city of Richmond, the trial court, and another to the supreme court of appeals of Virginia. Inasmuch as the latter court denied a writ of error, the judgment of the law and equity court was the highest court of the state to which the case could be carried, and a writ will therefore lie to that court if a Federal question is properly saved." *Id.* at 366.

In such cases, this Court's *jurisdiction* under 28 U.S.C. § 1257(3) properly runs to the state intermediate appellate court or trial court, whichever last ruled on the merits. *See Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 159-60 (1954); *Hammerstein v. Superior Court,* 341 U.S. 491, 492 (1951); *Chicago & Eastern Illinois Railroad Co. v. Industrial Comm'n,* 284 U.S. 296, 297-98 (1932); *Western Union Tel. Co. v. Priester,* 276 U.S. 252, 258 (1928); *American Railway Express Co. v. Levee,* 263

U.S. 19, 20 (1923)[5]; *Norfolk & Suburban Turnpike Co. v. Commonwealth of Virginia*, 225 U.S. 264, 267-69 (1912); *Sullivan v. Texas*, 207 U.S. 416, 422 (1908); *see also Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968).

In this case, Petitioner has asked this Court for a Writ of Certiorari *to the Supreme Court of Michigan, not the Michigan Court of Appeals.* The Jurisdictional Statement in the Petition reads in its entirety:

> "Jurisdiction to review the judgment in question by writ of certiorari is provided by 28 U.S.C. § 1257(3). This petition is being filed within 90 days of the Supreme Court of Michigan's order of October 6, 1987." Pet. for Cert., at 2.

Under this Court's Rules, the Statement of Jurisdiction in a Petition must identify the "judgment or decree sought to be reviewed."[6] The caption of the Petition in

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[5]In *Levee*, Justice Holmes, for a unanimous Court, held:

> "A preliminary objection is urged that the present writ of certiorari was addressed to the Court of Appeal and not to the Supreme Court. But under the Constitution of the State the jurisdiction of the Supreme Court is discretionary, . . . and although it was necessary for the petitioner to invoke that jurisdiction in order to make it certain that the case could go no farther, . . . when jurisdiction was declined the Court of Appeal was shown to be the highest Court of the State in which a decision could be had." 263 U.S. at 20-21 (citations omitted).

[6]Sup. Ct. R. 21.1(e) provides:

> "1. The petition for writ of certiorari shall contain, in the order here indicated:

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this case states: "On Writ of Certiorari to the Supreme Court of Michigan." The "Opinions Below" Section of the Petition also refers to the Michigan Supreme Court's Order denying Petitioner's Delayed Application for Leave to Appeal. Pet. for Cert., at 2. That Order is included in the Appendix to the Petition. Pet. for Cert., at 29a-30a.

Petitioner repeatedly states that the Michigan Supreme Court "denied [his Delayed Application] *on the merits.*" Pet. for Cert., at 4 & n.3 (emphasis added). However, with regard to the denial of an Application for Leave to Appeal, the Michigan Supreme Court has adopted the position of this Court with regard to the denial of a Petition for Writ of Certiorari: that the denial is *not* a decision on the merits. *Frishett v. State Farm Mutual Automobile Insurance Company,* 378 Mich. 733 (1966); Mich. Ct. R. 7.321; *see also People v. Hines,* 88 Mich. App. 148, 152, 276 N.W.2d 550, *lv. denied,* 406 Mich 934 (1979); *Owendale-*

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* * *

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:

(i) The date of the *judgment or decree sought to be reviewed,* and the time of its entry;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to petition for certiorari; and

(iii) Where a cross-petition for writ of certiorari is filed under Rule 19.5, reliance upon that Rule shall be expressly noted and the cross-petition shall state the date of receipt of the petition for certiorari in connection with which the cross-petition is filed.

(iv) The statutory provision believed to confer on this Court *jurisdiction to review the judgment or decree in question* by writ of certiorari." (Emphasis added).

Gagetown School District v. State Board of Education, 92 Mich. App. 719, 725, 285 N.W.2d 435 (1979), *aff'd*, 413 Mich. 1, 317 N.W.2d 529 (1982).

This Court should deny the Petition for Writ of Certiorari because, under the statutory grant of power embodied in 28 U.S.C. § 1257 and clarified in *Crovo, supra* and the other cases cited previously, this Court's jurisdiction to review decisions of state courts does not extend to a state court's refusal to exercise its discretionary power to hear cases. The Order of the Michigan Supreme Court denying Petitioner's Delayed Application for Leave to Appeal was just such a discretionary refusal to take jurisdiction over the attorney's fee issues.[7] This Court should deny the Petition for this reason alone.

II. THIS COURT SHOULD NOT GRANT THE PETITION FOR WRIT OF CERTIORARI AS THE PETITION DOES NOT SHOW THE EXISTENCE OF A CONFLICT THAT WARRANTS THIS COURT'S CONSIDERATION.

Petitioner asks this Court to grant certiorari in this case because of an alleged conflict between the decisions of the Michigan state courts in this case and the decisions of various Federal Courts of Appeals. Pet. for Cert., at 5, 8-11, 12.[8] Because the decisions of the Michigan state

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[7]Under the court rules in Michigan, the Michigan Supreme Court does not obtain jurisdiction unless and until it grants an Application for Leave to Appeal. Mich. Ct. R. 7.302(F)(3).

[8]This Court will grant certiorari on the basis of conflict only where a true conflict in principles of law exists; factual conflicts will not support review by this Court. *Wisconsin Electric Co. v. DuMore Co.*, 282 U.S. 813 (1931); *Sanchez v. Borras*, 283 U.S. 798 (1931); *see also Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923).

courts are consistent with the language and intent of the Civil Rights Attorney's Fees Act of 1976 hereinafter "§ 1988" or "the Act"),[9] and because no true conflict exists, Respondents urge this Court to deny the Petition for Writ of Certiorari.

A. The "Bright Prospects" Doctrine Is Consistent With The Statutory Language And Legislative History Of 42 U.S.C. § 1988.

A review of § 1988 and its accompanying legislative history leaves little doubt that Congress intended that the decision to award or deny attorney's fees under the Act was to be within the sound discretion of the trial judge. The so-called "bright prospects" approach to the award of attorney's fees under § 1988 is just one legitimate approach to the exercise of that judicial discretion.

Following this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), Congress enacted 42 U.S.C. § 1988, which provides that a court "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." In adopting § 1988, Congress explicitly rejected the mandatory imposition of attorney's fees in civil rights cases.[10]

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[9]42 U.S.C. § 1988 (1982).

[10]The House Report on § 1988 states:

> "The second key feature of the bill is *its mandate that fees are only to be allowed in the discretion of the court.* Congress has passed many statutes *requiring* that fees be awarded to a prevailing party. Again the Committee adopted a more moderate approach here by leaving the matter to the *discretion* of the judge, guided of course by the case law interpreting similar

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Courts have recognized the discretionary nature of fee awards under § 1988. *Blum v. Stenson*, 465 U.S. 886 (1984); *Johnson By Johnson v. Brelje*, 701 F.2d 1201 (7th Cir. 1983); *Stone v. City of Wichita Falls*, 668 F.2d 233 (5th Cir. 1983); *Muscare v. Quinn*, 614 F.2d 577 (7th Cir. 1980).

The express purpose for the passage of § 1988 was to provide a means to ensure that plaintiffs in civil rights cases would have access to the judicial system. Congress intended that § 1988 would provide the necessary access to those plaintiffs without the financial resources necessary to hire competent counsel. The legislative history of the Act brings home this point:

> "Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [the Attorney's Fee Award Act] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law." House Report, at 1.

The Senate Report contains similar statements of the legislative intent. Senate Report, at 5909-10; *see Evans v. Jeff D.*, 475 U.S. 717 (1986).

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> attorney's fee provisions. . . . The Committee intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing H.R. 15460." H.R. No. 94-1558, 94th Cong., 2d Sess., September 15, 1976, at 8 (emphasis added and in original, footnote omitted) (hereinafter "House Report").

The Senate Report also recognizes the discretionary nature of § 1988. S.R. No. 94-1011, *reprinted in* 1977 U.S. Code Cong. & Ad. News 5908, 5909 (hereinafter "Senate Report").

One method of determining whether to award attorney's fees under § 1988 is the so-called "bright prospects" rule, applicable to cases in which a plaintiff seeks relief in the form of monetary damages. This approach focuses on whether the *facts* of a particular case would have prevented or significantly inhibited a plaintiff from obtaining competent counsel. Where it is determined that the case was sufficiently appealing to enable a client to attract counsel, the trial court may exercise its discretion under § 1988 to deny an award of fees. In this case, the trial court applied this analysis to deny Petitioner's request for a fee award, and the Michigan Court of Appeals upheld the trial court's exercise of discretion.

The first case adopting the bright prospects rule was *Zarcone v. Perry,* 581 F.2d 1039 (2d Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979). In *Zarcone,* the Second Circuit Court of Appeals affirmed a denial of attorney's fees because of the absence of any "financial disincentive" for Plaintiff to obtain counsel. 581 F.2d at 1044. The Second Circuit looked to the rationale behind Congress' enactment of § 1988—the attraction of competent counsel in civil rights cases—and held that the trial court is to consider this purpose in the exercise of its discretion in determining whether to award attorney's fees.

The Second Circuit adopted the rule that:

> "where a plaintiff sues for damages and the prospects of success are sufficiently bright to attract competent private counsel on a contingent fee basis, the underlying rationale of the *Newman-Northcross* rule may be inapplicable since no financial disincentive

or bar to vigorous enforcement of civil rights may exist." *Id.*[11]

The Court looked at the particular factual circumstances in that case as to both liability and damages in determining whether Plaintiff had sufficiently bright prospects to obtain private counsel to enforce his civil rights claims. *Id.* Contrary to Petitioner's assertions, the bright prospects rule does *not* focus solely on the existence of a contingent fee contract. Other courts have followed the *Zarcone* approach. *Kerr v. Quinn,* 692 F.2d 875 (2d Cir. 1982); *Wheatley v. Ford,* 679 F.2d 1037 (2d Cir. 1982); *Milwe v. Cavuoto,* 653 F.2d 80 (2d Cir. 1981); *see also Buxton v. Patel,* 595 F.2d 1182 (9th Cir. 1979); *Eide v. Kelsey-Hayes, Inc.,* 154 Mich. App. 142, 197 N.W.2d 532 (1986), *lv. granted and lv. to appeal as cross-appellant denied,* 428 Mich. 873, 402 N.W.2d 468 (1987) (adopting bright prospects for use with the state civil rights statute).

Petitioner cites *Cooper v. Singer,* 719 F.2d 1496 (10th Cir. 1983) (en banc) and *Sanchez v. Schwartz,* 688 F.2d 503 (7th Cir. 1982), for the proposition that the bright prospects rule does not meet the *three* purposes of § 1988. The claim that there are three purposes for § 1988 is unsup-

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[11]Congress recognized that § 1988 would largely benefit those plaintiffs seeking injunctive relief. House Report, at 9. The House Report quoted with approval from *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968) (per curiam):

> " 'If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the *injunctive* powers of the federal courts.' " House Report, at 6 (emphasis added).

Congress did recognize that, in cases where plaintiffs' damages remedies are limited, attorney fees are necessary to secure effective representation. House Report, at 9.

ported by the statutory language and the legislative history.

Based solely on the decision in *Cooper, supra,* Petitioner claims that § 1988 serves the following purposes: (1) attraction of competent counsel; (2) punishment; and (3) deterrence. Pet. for Cert., at 9 (citing *Cooper, supra,* at 1501-1502). However, the notion that an award of attorney fees under § 1988 was meant to punish defendants and to deter civil rights violations is unsupported by the legislative history of the Act.

The view of Petitioner and of the Court in *Cooper, supra,* that there are three purposes that § 1988 was meant to serve is unfounded. The *Cooper* Court cites to *Sanchez v. Schwartz,* to support that proposition. The only citation in either case is to a student comment in the University of Chicago Law Review. Comment, *Attorney's Fees in Damage Actions under the Civil Rights Attorney's Fees Awards Act of 1976,* 47 U. Chi. L. Rev. 332 (1980).

The legislative history of the Act indicates that the sole purpose for this statute was to provide an incentive for competent counsel to undertake representation of plaintiffs alleging violations of their civil rights, particularly in cases seeking injunctive relief. Nothing in the legislative history supports the idea that punishment or deterrence were motivating factors in Congress' passage of the statute.[12]

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[12]The reading given to § 1988 and the delineation of its purposes by Petitioner and the Courts in *Cooper, supra,* and *San-*

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The bright prospects approach is consistent with § 1988's purpose to ensure that plaintiffs alleging civil rights violations have sufficient access to courts. The bright prospects approach focuses on whether, at the time that counsel is retained, the prospects for success are sufficiently bright that plaintiff would not have trouble attracting competent counsel to pursue a civil rights claim. *Kerr v. Quinn, supra,* at 879.

B. The Decisions Of The Michigan State Courts In This Case Do Not Conflict With The Attorney's Fee Cases From Other Jurisdictions Cited In The Petition.

The primary reason advanced by Petitioner for this Court to grant a Writ of Certiorari in this case is that the decisions of the Michigan state courts conflict with decisions of various circuit courts, decisions of this Court, and Congress' intent under § 1988.[13] A careful analysis

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chez v. Schwartz, supra, not only is without basis in the legislative history, but would make the punishment and deterrent purposes redundant with 42 U.S.C. § 1983 (1982) and the other civil rights statutes, since those substantive statutes are designed to satisfy the punishment and deterrence aims. Moreover, the Courts provide no evidence that the extra amount of money paid in attorney's fee awards under § 1988 above the Judgment would result in any extra amount of deterrence.

Further, the punitive rationale assumes that good faith litigation of civil rights claims is "obstructive." Petitioner's position on this contradicts his argument that there were very dim prospects for his recovery in this case. If those prospects were indeed dim, then the awarding of fees under a punitive purpose rationale would punish Respondents for litigating a case which they had a good chance of winning.

[13]As discussed in Argument II.A., *supra,* the bright prospects approach is entirely consistent with, and advances, the congressional intent.

of each of the cases cited by Petitioner reveals that no such conflict exists. Each of those cases is distinguishable either on the facts or on the issues of law presented.

Petitioner flatly states that the Seventh, Ninth and Tenth Circuit Courts of Appeals have "expressly repudiated" the bright prospects doctrine. Pet. for Cert., at 8-11. The cases relied upon by Petitioner[14] for this proposition in fact do not involve application of the bright prospects test as enunciated in *Zarcone, supra* and subsequent cases.

Petitioner first cites *Cooper, supra,* as expressly rejecting the bright prospects rule. In that case, however, the bright prospects doctrine as enunciated in *Zarcone, supra* was ***not*** at issue. Rather, the issue in *Cooper, supra* was whether a contingent fee contract would limit the *amount* of a fee award. *Id.* at 1503. Thus the *Cooper* Court's discussion of *Zarcone* was *dictum.*

Although the Court in *Cooper* discussed *Zarcone,* it misstated the bright prospects rule:

> "Under this ["bright prospects"] rule, fees are not awarded to prevailing parties who are able to attract counsel through contingent fee agreements." *Id.* at 1501.

The Court in *Cooper* viewed the bright prospects rule as looking to whether a plaintiff had *in fact* obtained counsel on a contingent fee basis, regardless of the prospects for success based on the facts of that plaintiff's case. The

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[14]Those cases are *Cooper, supra; Jones v. Wilkinson,* 800 F.2d 989 (10th Cir. 1986), *aff'd sub nom., Wilkinson v. Jones,* — U.S. — (1987); *Sanchez v. Schwartz, supra; Kirchoff v. Flynn,* 786 F.2d 320 (7th Cir. 1986); *Hamner v. Rios,* 769 F.2d 1404 (9th Cir. 1985).

rule announced in *Zarcone,* on the other hand, takes into account all the facts in the case and determines whether the prospects for success are bright enough that counsel would take the case. *Zarcone, supra,* at 1044. The *Zarcone* bright prospects rule would not allow the denial of an attorney fee under § 1988 merely because of the existence of a contingent feet contract, where the chances for success were dim *at the outset.*

The other cases cited by Petitioner as in conflict with the decisions of the Michigan state courts in this case also did not involve the application of the bright prospects rule as stated in *Zarcone.* The case of *Jones, supra,* was a case for *injunctive* relief and the issue there was whether corporate plaintiffs could be denied attorney fees because they had "deep pockets" and could afford litigation costs. *Id.* at 991. The Court in *Jones* recognized that the bright prospects doctrine was not relevant to its decision. *Id.* n.3.

In *Sanchez v. Schwartz, supra,* the Court, like the Court in *Cooper, supra,* mischaracterized the bright prospects rule as based on the notion that "a contingent fee contract *alone* will attract competent counsel to the case." 688 F.2d at 505 (emphasis added). Unlike the instant case, the Court in *Sanchez v. Schwartz* reviewed the decision of the trial court *to award* an attorney's fee under the abuse of discretion standard, and found no abuse. *Id.* Finally, the Court noted that the award of fees in that case was conditioned upon a waiver by Plaintiff's attorney of the contingent fee contract. *Id.* n.1.

In *Kirchoff, supra,* the issue was whether contingent fee contracts may be used as a measure in the computation of the amount of fees awarded under § 1988. *Id.* at

320. *Kirchoff* did not involve issues related to entitlement to fees. The Court's discussion of *Sanchez v. Schwartz* was *dictum*. The Court also recognized the distinction made between ordinary damages suits and suits to obtain injunctive relief or to set precedent, in which a monetary value is not ascertainable. 786 F.2d at 327.

In *Hamner, supra,* again the issue was whether the existence of a contingent fee arrangement *alone* could justify a denial of an attorney's fee award. *Id.* at 1405. The Court did, however, note that the existence of a contingent fee contract is one element that may be considered. The Court "emphasize[d] that a different case might be presented if a district judge concludes that fees should not be awarded based upon consideration of all the *Kerr* factors."[15] 769 F.2d at 1408. Contrary to Petitioner's assertions, the Court in *Hamner* did not overrule *Buxton v. Patel, supra.* Pet. for Cert., at 9-10. Rather, the decision in *Hamner* is consistent with *Buxton's* "admonition . . . that the presence of a contingent fee agreement is not necessary or sufficient to deny fees." *Hamner,* 769 F.2d at 1408 (citation omitted).

Other cases cited by Petitioner as being inconsistent with the bright prospects doctrine are also distinguishable. In *Sargeant v. Sharp,* 579 F.2d 645 (1st Cir. 1978), the issue before the Court was, once again, whether the existence of a contingent fee contract by itself justifies the denial of attorney's fees under § 1988. *Id.* at 649. The Court in *Sargeant* remanded the case for a redetermination by the trial judge of whether fees should be awarded and, if so, the amount to be awarded. *Id.* The Court is-

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[15]Referring to: *Kerr v. Screen Extras Guild,* 526 F.2d 67 9th Cir. 1975), *cert. denied,* 425 U.S. 951 (1976).

sued its remand order because the trial judge had failed to hold a hearing on the attorney's fee request, thereby denying plaintiff procedural fairness, and had failed to adequately give the reasons for the denial. *Id.* at 647.

Petitioner cites *Sullivan v. Crown Paper Bd. Co.,* 719 F.2d 667 (3d Cir. 1983), for the idea that attorney fees are always to be awarded; the only issue is the amount. Pet. for Cert., at 10. The *Sullivan* opinion, however, does not support this proposition and, if it did, such proposition would read all discretionary language out of § 1988, contrary to the clear legislative intent. The issue in *Sullivan* was how the existence of a contingency fee would affect an amount awarded, not entitlement to an award. *Id.* at 668. In fact, the Court of Appeals reversed the lower court because the trial judge did *not* take into account the contingency fee contract in setting the amount of the award. *Id.*

Gibbs v. Town of Frisco City, 626 F.2d 1218 (5th Cir. 1980) did not involve application of the bright prospects doctrine. There, the trial judge had reduced the amount of the fee awarded because of the similarity between the civil rights claim and a state law wrongful death action. *Id.* at 1220. The opinion is not, as Petitioner asserts, inconsistent with the bright prospects doctrine. Similarly, the bright prospects rule is not inconsistent with the decision in *Hall v. Hall,* 738 F.2d 718 (6th Cir. 1984). *Hall* did not involve any discussion of the factors that comprise the rule. Rather, *Hall* is an aberrational case. In *Hall,* the trial judge had denied attorney's fees to plaintiff because plaintiff was "drunken, ill-mannered," "anti-social and obnoxious." *Id.* at 721. *Hall* has no relevance to bright prospects or the instant case.

Finally, Petitioner cites to this Court's plurality opinion in *Riverside v. Rivera,* 477 U.S. 561 (1986) to support his contention that the bright prospects rule is "flatly inconsistent" with this Court's decisions. This Court, in *Riverside,* merely rejected a proposal for a strict rule that attorney's fees be proportionate to damages awarded. In fact, the plurality opinion rejected that proposal because it did not meet the sole purpose of § 1988: to afford access to the legal system for plaintiffs alleging civil rights violations. 91 L.Ed.2d at 481. This Court stated:

> "Moreover, the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort *but produce only small monetary recoveries." Id.* (emphasis added).

This Court's decision in *Riverside* is consistent with the bright prospects rule.

The cases cited by Petitioner to support his argument that the decisions of the Michigan State courts in ths case conflict with decisions of the Federal Circuit Courts and of this Court are distinguishable. Most of the cited cases do not involve the bright prospects doctrine as enunciated in *Zarcone, supra.* Because no real conflict exists, and because the bright prospects doctrine fulfills the purpose of § 1988, Respondents ask this Court to deny the Petition for Writ of Certiorari.

C. The Petition Does Not Present Issues Of Sufficient Significance To Warrant This Court's Review.

The Petition in this case does not present a question of sufficient significance to warrant this Court's exercise

of its extraordinary jurisdiction. Assuming for the sake of this argument only that everything stated in the Petition is correct, no significant issue of national importance is present by the Petition.

Petitioner claims that the "bright prospects" rule currently exists only as to cases brought in the Second Circuit and the Michigan State Courts.[16] Pet. for Cert., at 5. Petitioner states:

> "[The "bright prospects" rule] is still the rule in the Second Circuit. It is also an acceptable rule for federal civil rights cases brought into Michigan state courts, now that the Supreme Court of Michigan has declined to review the Court of Appeals conclusion that the bright prospects doctrine 'is supported by a substantial body of case law' (26a).
>
> * * *
>
> The 'bright prospects' exception created by the Second Circuit in *Zarcone* and reiterated in *Milwe, Kerr* and *DeFilippo* is not now accepted anywhere outside the Second Circuit and the state courts of Michigan." Pet. for Cert., at 5, 7.

Petitioner also states that he "is unable to locate *any* recent cases interpreting Section 1988 which even remotely suggests that similarity of the tort actions, substantial damages or a contingent fee agreement can be 'circumstances' rendering the award of fees unjust." Pet. for Cert., at 12 (emphasis in original).

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[16]As discussed previously, Respondents do not necessarily agree with Petitioner that the bright prospects doctrine has been "repudiated in every other federal circuit to have considered the issue . . . ." Pet. for Cert., at 5. However, for the sake of this argument, Respondents will assume that Petitioner is correct.

If Petitioner is correct that the bright prospects rule is only applied in Michigan and the Second Circuit, and if there have been no recent cases other than the instant case applying the bright prospects doctrine, then this case does not warrant this Court's exercise of its extraordinary jurisdiction.

III. THIS COURT SHOULD NOT GRANT THE PETITION FOR WRIT OF CERTIORARI TO REVIEW WHAT IS ESSENTIALLY A FACTUAL DETERMINATION MADE BY THE TRIAL JUDGE IN THIS MATTER IN THE EXERCISE OF HIS DISCRETION UNDER § 1988.

Petitioner also asks this Court to grant a Writ of Certiorari to decide whether the trial judge abused his discretion in denying Petitioner's request for attorney's fees in this case. The second question presented by Petitioner is:

> "Whether, assuming the 'bright prospects rule' is a permissible and desirable gloss on 42 USC § 1988, it is an abuse of discretion to deny attorney's fees on the basis of that rule in circumstances of the kind found in this case at the time counsel was retained." Pet. for Cert., at i.

Petitioner would have this Court review in detail the factual circumstances in this case and determine whether the trial judge abused the discretion afforded to him under § 1988, based solely on those factual circumstances.

Petitioner provides a lengthy discussion of his view of the facts in this case. At this point, Respondents need only point out the various internal inconsistencies in Petitioner's argument. Petitioner correctly points out that application of the bright prospects rule calls for the trial judge to view the prospects for success at the outset (i.e.,

when counsel is retained). Pet. for Cert., at 17. However, Petitioner then claims that the trial court in this matter was "speculating" in determining that Petitioner's prospects for success were bright. Pet. for Cert., at 16.

In additon, Petitioner cites to the Mediation Award in this case in support of his argument that his prospects for success were not bright. References to the Mediation Award are irrelevant under the appropriate standard, because no Mediation Award existed at the time that counsel was retained. By the same token, that Petitioner lost at trial as to Respondent City, and that Respondents have pursued this case on appeal, is entirely irrelevant to Petitioner's prospects for success *as viewed at the time that counsel was retained.*

Finally, Petitioner suggests that the law as to the use of deadly force against fleeing felons was not "established" at the time the Petitioner was shot. This position is diametrically opposed to Petitioner's previous position in the state courts that Respondent Smith was not entitled to qualified immunity under *Harlow, supra,* because the law was in fact clearly established at the time that Respondent Smith shot Petitioner.

This Court has long adopted the rule that it will not exercise its jurisdiction to review essentially factual determinations made by lower courts. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). In addition, this Court does not exercise its certiorari jurisdiction where the issue has no significance beyond that to the parties in the particular case. *Rice v. Sioux City Memorial Park Cemetary,* 349 U.S. 70, 74 (1955) ("Nor does

[this Court] sit for the benefit of the particular litigants.''). Petitioner would have this Court review the factual determination made by the trial judge in deciding that Petitioner's chances for success were bright at the outset. Certainly, this issue has no significance beyond this case.

———o———

CONCLUSION

For these reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

DONALD PAILEN (P34444)
Corporation Counsel for the City of Detroit
1010 City-County Bldg.
Detroit, Michigan 48226

DANIEL S. COOPER (P12201)
DAVID H. FINK (P28235)*
THOMAS A. BISCUP (P40380)
Special Assistant Corporation Counsels
COOPER, FINK & ZAUSMER, P.C.
1141 First National Bldg.
Detroit, Michigan 48226
313/963-3873

Counsels for Respondents

* Counsel of Record

Supreme Court, U.S.
FILED
FEB 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1211 (3)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

TERRANCE L. GUIDER,
Petitioner,

v.

RONALD SMITH AND THE CITY OF DETROIT,
Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITIONER'S REPLY BRIEF

Brian G. Shannon*
JAFFE, SNIDER, RAITT & HEUER,
Professional Corporation
1800 First National Building
Detroit, Michigan 48226
(313) 961-8380

Theodore Spearman
THEODORE SPEARMAN, P.C.
975 East Jefferson Avenue
Detroit, Michigan 48207

Attorneys for Petitioner Terrance L. Guider

*Counsel of Record

BOWNE OF DETROIT
615 SECOND AVENUE - DETROIT, MICHIGAN 48226 - (313) 964-1330

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I.
THE PETITION IS NOT JURISDICTIONALLY DEFECTIVE

This short reply brief is submitted by Petitioner Terrance L. Guider to address Respondents' contention that an error made in the wording of Guider's petition deprives this Court of jurisdiction to consider its merits. The petition, as originally filed, said "On Writ of Certiorari to the Supreme Court of Michigan" although Guider's intent is and was to seek review of a federal question incorrectly decided by the Michigan Court of Appeals (26a-27a), a decision which the Supreme Court of Michigan then declined to exercise its discretionary jurisdiction to review (30a).

The error on the cover of the petition was overlooked by the Clerk and Guider did not become aware of it until receiving Respondents' brief in opposition (Resp. Br. 1-8). Because Respondents have chosen to make their "jurisdictional" issue the lead issue in their response, this brief reply is necessary.

The error on the cover of the petition has been cured, at the suggestion of this Court's Clerk, by application of labels referring to the proper lower court. Respondents, however, continue to press their "jurisdictional" objections (Letter from Respondents to Chief Deputy Clerk Frank Lorson dated February 12, 1988). This reply will discuss the additional grounds which Respondents believe support their objections.

First, the petition *obviously* seeks review of the decision of an intermediate state appellate court, a decision which the highest court of the state declined to review. The state supreme court's refusal to exercise its discretionary jurisdiction is mentioned for two purposes only: To show that Guider exhausted his state court appellate recourse and to show that his petition was filed timely in this Court. Respondents understand this perfectly well, but assert that the petition is jurisdictionally defective because it is non-conforming in the following ways: (1) the jurisdictional statement cites only the Order of the Michigan Supreme Court (Resp. Br. 6); (2) the "Opinions Below" section cites to that Order (*id.* 7);

(3) that Order is included in the Appendix (*id.*); and (4) Guider "repeatedly" claims the decision of the Michigan Supreme Court was "on the merits" (*id.*).

Working backwards through these assertions, it is true the petition says in two places on page 4 that the Supreme Court of Michigan denied leave to appeal "on the merits," but, as footnote 3 on that page makes clear, Guider's point is that his *delayed* application for leave was denied because the Supreme Court was "not persuaded that the questions presented should be reviewed . . . [on the merits]" (30a), and *not because of the delay.*

Certainly Guider was not making the nonsensical assertion that a refusal to exercise discretionary appellate jurisdiction is a decision on the merits of a case (*see* authorities cited at Resp. Br. 7-8). Guider was saying only that the Supreme Court considered his application for leave to appeal as though it were timely under Michigan Court Rule 7.302(C)(2) rather than Rule 7.302(C)(3).[1]

Respondents point out that the Order of the Supreme Court of Michigan denying leave to appeal is included in Guider's Appendix (29a-30a) and that it is cited in both the "Opinions Below" and "Jurisdiction" sections of the petition. This was appropriate to discharge Guider's obligation to show this Court

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[1] RULE 7.302 APPLICATION FOR LEAVE TO APPEAL

(A) What to File. . . .

(B) Grounds. . . .

(C) When to File.

(1) Before Court of Appeals Decision. . . .

(2) Other Appeals. In other appeals the application must be filed within 21 days

(a) after the Court of Appeals clerk mails notice of an order entered by the Court of Appeals.

(b) after the filing of the opinion appealed from; or

(c) after the Court of Appeals clerk mails notice of an order denying a timely filed motion for rehearing.

(3) Later Application. A delayed application may be filed, it if is accompanied by an affidavit explaining the delay. However, a delayed application may not be filed more than 56 days after the Court of Appeals decision.

that he had exhausted his state appellate recourse and filed his petition within 90 days thereafter. Respondents do not mention that the appellate opinion discussed throughout the petition — the Opinion of the Michigan Court of Appeals — is cited first in the "Opinions Below" section and appears first in the Appendix (6a-28a). Clearly, the "judgment in question" mentioned in the "Jurisdiction" section is the judgment of the Michigan Court of Appeals. It is apparent from Respondents' argument on the merits (Resp. Br. 8-23) that they understand perfectly well what the legal issue at stake here is. They have made their "jurisdictional" argument in the hope this Court will review the petition in the spirit of form over substance, as though it were an ancient English writ that failed if a single word were spoken wrong or out of order.

II.
THE FEDERAL ISSUE IS CONCLUSIVE AND THE OUTCOME OF FURTHER PROCEEDINGS PREORDAINED

One final point needs to be addressed. Respondents point out that Guider does not have a final judgment against the City of Detroit. This is certainly true and Guider did not assert otherwise in the petition. What Guider did claim is that the City's loss in the Michigan Court of Appeals (24a-25a) and the Supreme Court of Michigan's refusal to review that loss (30a) means that eventually a final judgment inevitably will be entered against the City (Pet. for Cert. 4 n.2). Respondents suggest that a decision in the Supreme Court of Michigan for Officer Smith on the qualified immunity issue might somehow affect the City's liability under *Tennessee* v. *Garner,* 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), for its unconstitutional deadly force policy (Resp. Br. 3 n.2), but the suggestion makes no sense whatever. Respondents then raise the prospect of a petition by the City to this Court on the issue of *Garner*'s retroactivity (Resp. Br. 4 n.2), but the issue is not even presented in this case and in any event *Garner* unquestionably is retroactive. *E.g., Carter* v. *Chattanooga,* 803 F.2d 217, 219-224 (6th Cir. 1986); *Acoff* v. *Abston,* 762 F.2d 1543 (11th Cir. 1985).

Respondents would agree that Guider's entitlement to attorney's fees under Section 1988 has been finally decided by the Michigan courts and that it was "now or never" for his petition to this Court on the issue of attorney's fees and the "bright prospects" rule; Respondents' claim is that another ground supporting the Section 1988 decision may arise later because Guider may not remain the prevailing party. For the reasons just stated, that claim is devoid of substance. Although

> there are further proceedings—even entire trials—yet to occur in the state courts [this Court has jurisdiction] where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes

concluded, the judgment of the state court on the federal issue is deemed final.

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469, 43 L. Ed. 2d 328, 340, 95 S. Ct. 1029 (1975). Guider believes that his status as the prevailing party against the City is now, in the language of *Cox*, "preordained" to continue despite any further state court proceedings.

Still, if this Court deems it inappropriate for any reason to use this case as a vehicle to consider the "bright prospects" rule *now*, before Guider actually has a formal final judgment against the City, the appropriate response would be to dismiss this petition without prejudice as having been filed prematurely.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Guider requests that this Court reject Respondents' "jurisdictional" attack on the petition. For the reasons stated in the petition itself, the question whether the "bright prospects" rule is a permissible and desirable gloss on the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, is an important issue as to which the conflict among the circuits should be resolved. Guider's petition should be granted now so that that conflict can be resolved as soon as possible. If this Court is unsatisfied with the finality of Guider's status as the prevailing party, however, Guider urges this Court to postpone a decision on the petition until any vestigial concerns with finality have been resolved, either by holding the petition in abeyance or dismissing it without prejudice as having been filed prematurely.

Respectfully submitted,

BRIAN G. SHANNON*
JAFFE, SNIDER, RAITT & HEUER
Professional Corporation
1800 First National Building
Detroit, MI 48226
(313) 961-8380

THEODORE SPEARMAN
975 E. Jefferson
Detroit, MI 48007

Attorneys for Petitioner
Terrance L. Guider

**Counsel of Record*